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Contracts contrary to fundamental principles and mandatory rules of European Contract Law

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Abstract

All the legal systems in Europe address the regulation of the so-called «illegal» or «illicit contracts», which are sanctioned with some type of invalidation. However, they deal with this issue by means of very different instruments, institutions, and legislative techniques, like the «illegal contractual cause», the contrariness to public morality (gute Sitten) or, among others, the category of «illegality» at common law. Doubtless, this disparity of approaches constitutes an important technical-juridical barrier to any attempt at harmonization of the Contract Law at a European level. However, a uniquely audacious and thought-provoking proposal for a uniform approach to illegal contracts has emerged throughout two basic instruments of soft law: the Principles of European Contract Law and the Draft Common Frame of Reference. Both regulatory texts are based on the essential distinction between contracts that are contrary to principles regarded as fundamental in the legal systems of the EU Member States, and those that infringe mandatory rules. The purpose of this paper is to analyse and describe these topics, taking into account both the instruments of soft law as well as the existing European case law.

Title: *Contracts contrary to fundamental principles and mandatory rules of European Contract Law*

Palabras clave: Derecho Europeo de contratos, causa ilícita, orden público, contratos ilegales, principios fundamentales, ineficacia, daños, restitución
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1. Introduction*

1.1. The regulation of illegal contracts in European private law

It can be argued that case law, in the broad sense of the word, rejects those contracts that are contrary to law, morality, good morals or public policy, on the understanding that there is an «inherent limit to contractual freedom» (*Grenze der Vertragsfreiheit*) that derives from the fact that neither can a legal system enshrine something that violates its own principles nor tolerate acts that contravene the law[1]. Indeed, the German treatise writer VON TUHR claims that «the law does not protect any business transaction, but only those that are consistent with our social and economic conditions»[2]. Thus, all the legal systems in Europe address the regulation of the so-called «illegal» or «illicit contracts», which are sanctioned with some type of invalidation or ineffectiveness[3].

Besides this coincidence in the general approach, however, different national legal systems deal with the issue of illegal contracts by means of very different instruments, institutions and legislative techniques. Thus, while some countries such as Spain and Italy follow the causalist approach (originally of French inspiration[4]) and link the phenomenon of contractual illegality to the existence of an illegal contractual cause[5], in the German system recourse is made to the general clause (*Generalklauseln*) of contrariness to public morals (*gute Sitten*)[6], whose content is specified in accordance with the intervention of the judge on a case-by-case basis. Furthermore, in English common law the restrictions of contractual freedom can derive from both the law per se (statutory illegality) and the principles of common law (illegality at

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[1] TREBILCOCK, *The limits of Freedom of Contract*, Harvard University Press, 1997.

[2] VON TUHR, *Derecho Civil. Los hechos jurídicos*, vol. II, Marcial Pons, 2005 (Spanish translation by RAVÁ), p. 166.

[3] ZWEIGERT/ KÖTZ, *Introduction to Comparative Law,* Oxford, 1998, p. 380.

[4] Originally, under the influence of DOMAT and POTHIER the French *Code Civil* made legal cause (*consideration* in common law; *causa* in civil law) an essential element to determine the validity of a contract (Arts. 1131 and 1133). However, after the legal reform introduced by the *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, which came into force on 1 October 2016, the new Art. 1162 separates illegal contracts from legal cause: «a contract cannot abrogate public policy, neither through its provisions nor through its object.» SAVAUX, Éric «Le contenu du contrat», *La Semaine Juridique*, 21, 2015, pp. 20 ss.

[5] Art. 1275 of the Spanish Civil Code (CC) states that «contracts without legal cause or with illegal cause are completely void. The cause is illegal when it is contrary to the law or morality.» The *Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos* (Proposal for Modernizing the Civil Code with regard to Obligations and Contracts) maintains legal cause as a benchmark for determining contractual illegality. Comisión General de Codificación – Sección de Derecho Civil, «Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos», in *Boletín de Información – Ministerio de Justicia*, 2010. Art. 1343 of the Italian Civil Code also establishes that «the cause is illegal when it is contrary to mandatory rules, public policy or good morals.»

[6] § 138 BGB and § 879 ABGB talk of «violation of common decency» (*Verstoβ gegen die guten Sitten*), on the understanding that this is equivalent to «the common decency of reasonable people» (*Anstandsgefühl aller billig und gerecht Denkenden*). INFANTE RUIZ/OLIVA BLÁZQUEZ, «Los contratos ilegales en el Derecho privado europeo», *InDret*, 3, 2009. On the other hand, the Swiss Civil Code of Obligations refers to «immorality» (Art. 20 OR) and the Hungarian Civil Code to breach of «good morals» [§ 200 (2)], as with the Civil Code of the Czech Republic (§ 39).

common law)[7]. Lastly, in Polish law those legal acts that violate «the law or the principles of social co-existence» (Art. 58 CC) are considered void, and in Danish law nullity is linked to the general violation of «public policy» (*Danske Lov*, 1683, § 5-1-2).

Doubtless, this disparity or heterogeneity of approaches constitutes an important technical-juridical barrier to any attempt at harmonization in this regard at a European level. Nonetheless, as will be seen below, in Europe a uniquely audacious and thought-provoking proposal for a uniform approach to illegal contracts has recently emerged.

1.2. Illegal contracts in the instruments of modern European contract law

The illegal contract concept is currently envisaged in two basic instruments of contemporary European soft law[8]: the Principles of European Contract Law (PECL)[9] and the academic Draft Common Frame of Reference (DCFR)[10] under the aegis of the European Commission[11] and Parliament[12].

Nevertheless, the simple truth is that, initially, this issue was not even contemplated in the original plans for harmonization, to the extent that the PECL expressly excluded nullity on the grounds of illegality or immorality from their scope of application (Art. 4:101 PECL). In all likelihood, the legal diversity mentioned in the previous section, together with the matter's intrinsic complexity, made the drafters of the PECL abandon the task of expressly regulating this thorny legal concept, settling instead for a brief reference to illegal contracts (*contra legem*) (Art. 1:102 PECL)[13]. However, when the Third Commission on European Contract Law started work, MACQUEEN advocated for the incorporation of the illegal contract concept, since he believed that if the PECL intended to constitute an overall system of contract law and the basis for a future European civil code, it was essential that neither the national legal systems nor that of the European Union (EU) should become divorced from reality[14]. Moreover, he considered that this could encourage both national and EU lawmakers to address contract invalidity as another form of sanction in their respective legislations on market transactions. The proposal

[7] BEATSON et al. (eds.) *Anson's Law of Contract*, 29th ed., Oxford University Press, 2010, p. 379. BURROWS, *A Restatement of the English Law of Contract*, Oxford University Press, 2016, p. 221. However, other authors generally refer to the «illegality doctrine», distinguishing between illegality deriving from a breach of law (illegality) and that which is contrary to «public policy». ANDREWS, *Contract Law*, Cambridge University Press, 2011, pp. 621 ss.; BUCKLEY, *Illegality and Public Policy*, 2nd ed., Sweet & Maxwell, 2009.

[8] For further details, see ZIMMERMANN, «The Present State of European Private Law», *American Journal of Comparative Law*, 57, 2009, p. 482.

[9] LANDO/BEALE (eds.), *Principles of European Contract Law*, Part II, 2000.

[10] INFANTE RUIZ, «Entre lo político y lo académico: Un Common Frame of Reference de derecho privado europeo», *Indret*, 2, 2008, p. 12.

[11] Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan (COM/2003/0068 final).

[12] European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law (P6_TA(2008)0397).

[13] «Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles» (*see* Arts. 4:118, 6:105 and 8:109 PECL).

[14] MACQUEEN, «Illegality and Immorality in Contracts», in VAQUER ALOY (ed.), *La Tercera Parte de los Principios de Derecho Contractual Europeo*, Tirant Lo Blanch, 2005, pp. 549 ss.

was accepted and, not without additional hurdles[15], the illegal contract concept was ultimately provided for in Chapter 15, Part III, of the PECL, entitled «Illegality».

The DCFR also tackles the issue of illegal contracts in Section 3, Chapter 2, Book II, under the title of «Infringement of fundamental principles or mandatory rules»[16]. In our view, its systematic placement is more appropriate than that of the PECL, insofar as it is included in the chapter entitled, «Grounds of Invalidity», and is regulated after the topic of «Vitiated consent or intention»[17].

Both regulatory texts are based on the essential distinction between contracts that are contrary to fundamental principles and those that infringe mandatory rules. While the former includes examples of contracts contrary to public policy and to good morals or morality (Arts. 15:101 PECL and II. – 7:301 DCFR), the latter regulate the regime of ineffectiveness of contracts contrary to or infringing a law of a mandatory nature (Arts. 15:102 PECL and II. – 7:302 DCFR). After defining and delimiting the subject matter of both scenarios, both the PECL and the DCFR regulate the effects produced by the illegality or immorality of a contract (Arts. 15:103-15:105 PECL, and II. – 7:303 and 7:304 DCFR). Although the content of the two legal instruments is fairly similar, there are significant differences that will be revealed further on.

Lastly, even though it is not a pan-European instrument, it should also be taken into account that the 2016 edition of the UNIDROIT Principles of International Commercial Contracts (UPICC) regulates the «illegality» of international contracts in Chapter 3 on validity. However, the scope of these principles is more restricted than that of the PECL and the DCFR, since it only covers contracts infringing mandatory rules (Art. 3.3.1) and restitution (Art. 3.3.2)[18].

2. Contracts that infringe the fundamental principles of the case law of the Member States of the European Union

2.1. Concepts

In fairly similar terms, Articles 15:101 PECL and II. – 7:301 DCFR address the issue of contracts contrary to or that infringe principles regarded as fundamental in the legal systems of the EU

[15] MACQUEEN himself describes how in the last session of the Commission held in Copenhagen in February 2001, it was necessary to vote on a sort of full amendment that intended to eliminate the provisions relating to illegality from Part III of the Principles, MACQUEEN, «Illegality and Immorality in Contracts: Towards European Principles», in HARTKAMP et al. (eds.), *Towards a European Civil Code*, 4th ed., Wolters Kluwer, 2011, p. 557.

[16] The DCFR does not employ the term «illegality» because, as is clarified in the comments, it «is not necessarily the most appropriate term for some infringements of fundamental principles or mandatory rules. In some cases, the contract may be immoral rather than illegal and in some cases it may just suffer from a defect of a rather formal or regulatory character,» in VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, vol. I, Full Edition, Sellier European Law, 2010, p. 536.

[17] The regulation of illegal contracts should be included in Chapter 4, pertaining to contract validity, since problems of ineffectiveness of certain agreements that contravene the law, good morals or public policy are ultimately resolved. No wonder, then, that in the official comments it is stated that «in any new edition of all three Parts this Chapter would probably form a separate section in a slightly modified Chapter 4,» in LANDO et al. (eds.), *Principles of European Contract Law,* Part III*,* Kluwer Law International, 2006, p. 211.

[18] See in relation to the previous edition (unchanged in this point), BONELL, «The new provisions on illegality in the UNIDROIT Principles 2010», *Uniform Law Review*, 3, 2011, p. 517.

Member States. In the official comments to both articles, it is clarified that the use of this criterion responds to the need «to avoid the varying national concepts of immorality, illegality at common law, public policy, ordre public and bonos mores, by invoking a necessarily broad idea of fundamental principles found across the European Union, including EU law»[19]. In other words, these regulatory proposals deliberately reject resorting to a series of classical and disparate concepts habitually employed in European law, opting instead to establish a new benchmark to determine the illegal nature of contracts: «principles recognised as fundamental in the laws of the Member States of the European Union».

To our mind, the option of resorting to the indefinite legal concept of «principles», in lieu of the general criteria of morality or good morals and public policy, should be considered an intelligent and correct decision, at least for two obvious reasons[20]:

(1) On the one hand, the invocation of certain conceptual categories that are not precisely clear in comparative law is thus avoided. Sure enough, in the first instance, while the term «good morals» (*boni mores*[21]) is employed in some countries, in others the expression «morals» [22] or even the criterion of «decency» [23] is resorted to and, even though the intention is to express the same concept in all cases, nuances and differences are inevitable. With respect to the concept of *ordre public*, employed in the new Article 1162 of the French *Code Civil*, it does not expressly appear in the Germanic systems[24], while in common law there is a term, «public policy», that could be equivalent, though it leads to uncertainty and some degree of insecurity due to the judicial discretion that it implies[25].

(2) On the other, the golden rule of uniform law is thus complied with: to avoid the incorporation of strictly national concepts that could be interpreted in a different way, in accordance with the legal system that each judge or court has to apply, since otherwise

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[19] VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law*, vol. I, p. 536; LANDO/BEALE, *Principles of European Contract Law*, Part I, p. 211. In the words of MACQUEEN, *Towards a European Civil* Code, it is the «common weal», p. 558.

[20] In this respect, it has been claimed that the formulation of the PECL is «more aseptic» (and probably less controversial)», FAJARDO FERNÁNDEZ, «Forma, objeto y causa/consideration», in CÁMARA LAPUENTE (coord.), *Derecho Privado Europeo*, Colex, 2003, p. 424.

[21] Good morals are described in the digest as acts that, according to Aemilius Papinianus, offend «*pietatem existimationem verecundiam nostrum*» (D. 28.7.15). Later on, POTHIER referred to the cause contrary to justice, good faith or morality (POTHIER, *Traité des obligations*, Dalloz, 2011 reprint, p. 22). However, the recent reform of the French Civil Code has eliminated the reference to «bonnes moeurs» from Art. 1162, a move that has been criticized by one of the most relevant sectors of legal doctrine, on the understanding that it is a very useful concept in the context of commodified contemporary societies. SAVAUX, *La Semaine Juridique*, p. 22. At any rate, the good morals concept is still used both in the Italian Civil Code (Art. 1343: *buon costume*) and in the Portuguese Civil Code (Arts. 280 and 281: *bons costumes*). In English common law, as has been seen above, reference is also made to the category of «agreements which are contrary to good morals», in BEATSON et al., 29th, p. 393.

[22] Arts. 1255 and 1275 of the Spanish CC (contract contrary to morality).

[23] *Danske Lov* (1683) Art. 5.1.2, which provides for the avoidance of contracts contrary to decency. LANDO/BEALE, *Principles of European Contract Law*, Part I, p. 213.

[24] The term «public policy» appeared in the first draft bill of the BGB, but was then eliminated as it was thought to be confusing, being substituted by *gute Sitten*. In any case, it is claimed that the concept «encompasses the clash with public policy in the broad sense of the word,» ENNECCERUS/NIPPERDEY, *Tratado de Derecho Civil. Derecho Civil (Parte General),* volume 2, 3ª ed., Bosch, 1981, p. 621.

[25] BIRKS, *English Private Law*, volume II, Oxford University Press, 2000, p. 83.

harmonization would only be attained at a formal or legislative level, though not at a material or case law one[26].

Nevertheless, the main problem of this solution lies in identifying those fundamental principles of law of the EU Member States. In this connection, a distinction should be drawn between two different juridical levels: on the one hand, the fundamental principles of EU law in the strict sense of the word and, on the other, the principles recognized as fundamental in the different legal systems of the EU Member States.

First and foremost, it should be noted that the idea of «principles», recognized as part of an «unwritten law», is not a novel concept in EU law[27]. In point of fact, some very significant academic studies have taken on the responsibility of highlighting and systemizing a corpus of general principles of a flexible and broad nature which serve to interpret and apply EU law[28]. Furthermore, the European Union Charter on Fundamental Rights has reinforced the effect of these principles by expressly establishing that EU institutions and bodies, in addition to the Member States (when applying EU law), are obliged to respect the rights and observe and promote the principles provided for in the Charter (Art. 51.1). In short, both lawmakers and EU doctrine and case law acknowledge the existence of a series of fundamental principles that serve to interpret and review the legislative or executive acts emanating from the EU[29].

But where are such principles to be found? It can be argued that the task of identifying the fundamental principles naturally falls to the Court of Justice of the European Union[30], since it is down to this body to interpret and apply not only treaties, but also regulations, directives and decisions («secondary law»). However, with the aim of introducing greater legal certainty in the always complex field of principles, the official comments to Articles 15:101 PECL and II. – 7:301 DCFR indicate that these should be sought in a series of reference texts of European constitutional law: the European Community Treaty (e.g. in favor of free movement of goods[31], services[32] and persons, protection of market competition); the European Convention on Human Rights [e.g. prohibition of slavery and forced labor (Art. 3), right to liberty and security (Art. 5), respect for private and family life (Art. 8), freedom of thought (Art. 9), freedom of expression (Art. 10), freedom of association (Art. 11), right to marry (Art. 12) and peaceful enjoyment of

[26] GORLA, «Unificazione 'legislativa' e unificazione 'giurisprudenziale'. L'esperienza del diritto comune», *Il Foro Italiano*, 2-3, C-4, 1977, pp. 91 ss.

[27] The construction of the distinction between «principles» and «rules» (or «regulations») in Europe is basically due to the theoretical contribution of ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Mohr Siebeck, 1954. In North American doctrine, as is sufficiently known, noteworthy is the contribution of DWORKIN, *Taking Rights Seriously*, Harvard University Press, 1977.

[28] On these principles, see GROUSSOT, *General Principles of Community Law*, Europa Law, 2006; TRIDIMAS, *The General Principles of EC Law*, Oxford University Press, 2007; BERNITZ et al. (eds.), *General Principles of EC Law in a Process of Development*, Wolters Kluwer, 2008.

[29] «Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed», PRAESIDIUM OF THE CONVENTION, *Explanations of the Praesidium relating to the Charter of Fundamental Rights, Official Journal of the European Union*, C 303/17, 14 December 2007, p. 35.

[30] REICH, General Principles of EU Civil Law, Intersentia, p. 2.

[31] ECJ Case C-531/07, *Fachverband der Buch- und Medienwirtschaft v Handelsgesellschaft mbH* ECR I-3717, 30 April 2009 (ECLI:EU:C:2009:276).

[32] ECJ Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd. v Stephen Grogan and others. ECR I-4685, 4 October 1991 (ECLI:EU:C:1991:378).

possessions (First Protocol, Art. 1)]; and the European Union Charter on Fundamental Rights [which in addition to many of the aforementioned rights includes such matters as respect for personal data (Art. 8), freedom to choose an occupation and right to engage in work (Art. 15), freedom to conduct a business (Art. 16), right to property (Art. 17), equality between men and women (Art. 23), children's rights (Art. 24), rights of collective bargaining and action (Art. 28), protection in the event of unjustified dismissal (Art. 30) and a high level of consumer protection (Art. 38)] [33]. So then, if the provisions of a contract lead to a violation of any of these principles and rights[34], its nullity can be affected in the terms that will be covered below.

As can be seen, the drafters of both the PECL and the DCFR focused their attention predominantly on a series of legal instruments enshrining the fundamental principles of the functioning of the EU, as well as the essence of the fundamental rights of European citizens. Therefore, it is unavoidable to reach the conclusion that the reference made to the «fundamental principles» is somewhat confusing and rather vague, inasmuch as it would be invoking both the general principles of law per se and citizens' rights, two categories that are not exactly equivalent. It should be recalled that in this respect the European Union Charter on Fundamental Rights grants a different effect and scope to the rights and principles that are recognized in its text: while the former should be respected in all cases, the latter only have to be observed[35]. The difference can be undoubtedly subtle[36], but for one of the most important sectors of legal doctrine the drafters of the Charter undeniably enshrined the model of «indirect horizontal effect» of the principles, insofar as these can only be invoked in private relationships if they have been recognized by means of specific legislative and executive acts (*interpositio legislatoris*)[37]. In a nutshell, it was not felt that the same scope should be given to both and therefore the reference that is made to fundamental principles is confusing and, in the long term, could lead to interpretive problems.

On the other hand, even though the option of listing a series of principles expressly provided for in the texts of the so-called «primary law» of the EU should be welcomed, to the extent that it has provided a certain degree of clarity and certainty, it should be noted that the list that was previously drawn up is not a closed one (*numerus clausus*), since just as its specific identification or final configuration is always arguable[38], so too are fundamental principles *per*

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[33] VON BAR/CLIVE (eds.), Principles, Definitions and Model Rules of European Private Law, vol. I, p. 536; LANDO/BEALE, Principles of European Contract Law, Part I, pp. 211 ss.

[34] For example, when some type of discrimination based on the nationality of the parties is included in a work contract (breach of the principle of freedom of movement for persons), ECJ Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, *Royal club liégeois SA v Jean-Marc Bosman and others*, and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman*. ECR I-4921, 15 December 1995 (ECLI:EU:C:1995:463).

[35] «Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Art. 51(1))», PRAESIDIUM OF THE CONVENTION, *Explanations of the Praesidium relating to the Charter of Fundamental Rights*, p. 35.

[36] It has been said that the differentiation «should not be exaggerated», REICH, *General Principles of EU Civil Law*, p. 9.

[37] LECZYKIEWICZ, «Horizontal Application of the Charter of Fundamental Rights», *European Law Review*, 38, 2013, p. 488.

[38] In the field of EU civil law, REICH distinguishes up to seven general principles: «the principle of 'framed' autonomy, protection of the weaker party, non-discrimination, effectiveness, balancing, proportionality, and, finally, good faith and prohibition of abuse of rights. However, the author expressly recognized that whether the good faith is 'on the move' to becoming a general principle of EU civil law depends on further legislation by the Union and on the case law of the ECJ,» REICH, *General Principles of EU Civil Law*, pp. 6 and 212.

natura flexible and unpredictable, it being possible to modify their content and scope in accordance with the evolution of European society[39].

As to the principles emanating from the law of the different EU Member States, in the official comments to the PECL it is recognized that «comparative study can give further help in the identification and elucidation of principles recognised as fundamental in the laws of the Member States»[40]. In other words, the opposite path can be taken to identify, by means of comparative analysis, a series of fundamental principles emanating from the law of the different EU Member States. We will now analyze the most important principles that have been identified by the court practice of the majority of these countries.

2.2. Contracts contrary to the fundamental principles of the case law of the Member States of the European Union[41]

As has just been seen, besides the principles acknowledged in EU documents, there are others that should be identified and clarified by means of comparative studies, bearing in mind that, in any event, «Merely national concepts as such have no effect under the Article and may not be invoked directly»[42]. True enough, the drafters of the PECL and DCFR could have drawn up a tentative list of normally illegal or immoral contracts that bestowed a certain degree of legal security and certainty on the concept of «infringing fundamental principles of law», by imitating common law doctrine or the German case group system»[43]. From a pragmatic perspective, however, such a solution would have been a mistake inasmuch as it would have petrified such a concept and prevented it from adapting to the times, thus resulting in something unnecessary and pointless; regardless of the fact that we also believe that it would not have been a simple matter to reach a consensus on the drawing up and approval of a list of this type[44].

At any rate, it is useful to list the most frequent cases of illegal contracts—for being contrary to morality or public policy—which the case law of the different EU Member States has drawn up over the years[45]. Thus, the partially indeterminate legal concept of «fundamental principles of law of the EU Member States» could gain in security and certainty. To this end, we will now

[39] «The public policy underpinning principles recognized as fundamental may change over time, in accordance with the prevailing norms of society as they develop», VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law*, vol. I, p. 536.

[40] LANDO/BEALE, Principles of European Contract Law, Part I, p. 212.

[41] References to English law are to be understood as a member country until the conclusion of Brexit. In any case, its inclusion in this study is essential from a comparative law point of view.

[42] VON BAR/CLIVE (eds.), Principles, Definitions and Model Rules of European Private Law, vol. I, p. 336.

[43] It should be pointed out, nonetheless, that some of the fundamental principles of EU law are expressly provided for in other passages of the PECL, such as the prohibition of usurious contracts, recognized under the concept of excessive benefit or unfair advantage (Art. 4:109 PECL), or the prohibition of unfair terms (Art. 4:110 PECL).

[44] For instance, as will be seen further on, the so-called «pactum de quota litis» is considered illegal in some EU Member States (such as Germany), whereas in others (the United Kingdom and Spain) it is a perfectly legal agreement.

[45] BEALE et al., *Cases, Materials and Texts on Contract Law* 297, Hart, 2010, p. 297.

draw a distinction between the following cases according to the official comments to Article II. – 7:301 DCFR[46]:

a. Contracts that entail a violation of sexual morals and the principles of family life

It can be a complicated matter to establish whether or not a contract is contrary to European morality or good morals[47]. If it is already a challenge in itself to establish the morals of a society located on the geographical and cultural margins of a specific state, how much more so is it to identify the social morality of all the countries making up the EU, whose societies are, on occasion, far-removed as regards issues such as marriage, registered partnerships, assisted reproduction, sexual morality, etc. Moreover, it should not be underestimated the fact that the concept of morality or good morals is being continuously subject to a process of review and reflection, especially fast-paced at present, for which reason caution should be taken when deciding what practices are contrary to morality[48]. So, it should come as no surprise that it has continually been claimed that any attempt to construct a unitary and uniform concept of «European good morals» would be a disproportionate endeavor[49].

However, taking into account that this is a regulation potentially destined to be applied at a European level, an effort must be made to avoid exporting or imposing on others a particular concept or perception of «good morals». In addition, it has been rightly noted that, generally speaking, judges do not have to impose their own vision of morality on society (*tendence idéaliste*)[50], but to apply «recognised and widely held value-judgments»[51].

All the same, contracts that violate sexual morality[52] have been considered a clear-cut example of illegal or void contracts in European case law. A truism, fairly common up to a point, is that of rental contracts of immovable property for the purpose of engaging in prostitution. Thus, in

[46] «Thus the Article extends to contracts placing undue restraints upon individual liberty (for example, being constraints of excessive duration or covenants not to compete), upon the right to work, or being otherwise in restraint of trade, contracts which are in conflict with the generally accepted norms of family life and sexual morality, and contracts which interfere with the due administration of justice (e.g. champertous agreements in England, *pacta de quota litis* elsewhere).» VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law*, vol. I, p. 536.

[47] It is with good reason that the doctrine of immorality has historically had its detractors. Thus, HUC stated that «if morality is allowed to invade the field of law, public guarantee is weakened, political and social order are destroyed, there is a rush towards anarchy,» cited by DE CASTRO Y BRAVO, *El negocio jurídico*, Cívitas (rep. facs.), 1985. For an in-depth debate on this issue, *see* OLIVA BLÁZQUEZ, «Límites a la autonomía privada en el Derecho de los contratos: la moral y el orden público», in PARRA LUCÁN (ed.), *Autonomía privada en el Derecho civil*, Aranzadi, 2016.

[48] «The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time» (*Evanturel v Evanturel*, 1874, L.R. 6 P.C. 1, 29). In this connection, LÉVY-BRUHL referred to the relativity of moral practice, inexorably linked to a specific historical and sociological context, in LÉVY-BRUHL, *La Morale et la Science des MOEURS*, 3rd ed., 1927, p. 82, available at electronic edition (2002) http://classiques.uqac.ca/classiques/levy_bruhl/morale/morale.pdf.

[49] MARTÍNEZ DE AGUIRRE Y ALDAZ, «Notas sobre las 'condiciones relativas al contenido' del contrato (utilidad, posibilidad, licitud y determinación)», in *Comentarios en Homenaje al Prof. D. José Luis de los Mozos*, Dykinson, 2003, p. 193.

[50] FLOUR et al., *Droit Civil. Les obligations* 1, 16th ed., Dalloz-Sirey, 2014.

[51] MARKESINIS et al., The German Law of Contracts. A Comparative Treatise, Hart, 2006.

[52] «Decency and sexual modesty,» as can be read in the ruling of the Italian *Corte de Cassazione* of 23 March 1985 (*Riv. Not.*, 1276, 1985).

English common law[53] the contract for renting a sedan to a prostitute in order to engage in prostitution has been considered immoral[54]. In French law, the same has historically been the case with the running of a *maison de tolérance* [55]. And in 1975, a German court considered that the contract under which a hotel owner had agreed to rent a double room to an unmarried couple was morally offensive and thus void[56]. In this day and age, however, none of these contracts can be regarded as illegal, except in the case of some sort of abuse or illegal exploitation of the people entering into them.

With respect to contracts performed as a result of an extramarital affair, French case law held, until the *arrêt* of the *Cour de Cassation* of 3 February 1999, that the acts of liberality of a married man in favor of his lover were void whenever they pursued «la formation, la continuation ou la reprise des rapports immoraux ou leur rémunération»[57], but were deemed valid when they intended to ensure the upkeep of the woman after a prolonged relationship or to recognize the assistance or help provided. German and Swiss case law has traditionally endorsed a similar line[58]. In common law, the promise to pay a woman a sum of money in exchange for becoming the lover of the other party to the agreement has been deemed illegal (meretricious purposes)[59]. And finally, the Spanish courts considered all those contracts linked to the existence of «illicit love affairs» or *more uxorio* contrary to morality, and therefore void due to the concurrence of «causa torpe» (*turpitudu*) [60]. Nonetheless, it should be noted that, as in the aforementioned cases, no judge would now consider a contract void for merely referring to extramarital legal affairs[61].

What occurs nowadays with rent-a-womb or surrogacy contracts (surrogate motherhood) is another kettle of fish. In effect, these contracts are considered illegal for being contrary to good morals and public policy in the majority of European legal systems (*OLH Hamm*, 2 December 1985)[62], including that of the United Kingdom up to a certain point since it regards these types of agreements as «unenforceable» (Surrogacy Arrangements Act 1985 section 1 B)[63]. On the other hand, most legal systems have introduced legal provisions prohibiting surrogate motherhood, while only a few have passed laws to allow it under strict conditions. This question is discussed in detail below under «Contracts infringing mandatory rules».

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[53] For further details, see TREITEL/PEEL, *The Law of Contract*, Sweet & Maxwell, 2010, p. 490.

[54] *Pearce v Brooks* (1866), L.R. 1 Ex. 213.

[55] See AUBERT et al., *Droit Civil. Les obligations,* T. I, Sirey Université, 2010, p. 296. However, most of these cases have been surmounted; see FENOUILLET, «Les bonnes mœurs sont mortes! Vive l'ordre public philanthropique», *Le droit privé à la fin du XXe siècle. Études offertes à P. Catala*, Litec, 2001, p. 487.

[56] Amtsgericht Emden, 11 February 1975 (5 C 788/74), «Zur Sittenwidrigkeit bei Beherbergung von Verlobten in einem Doppelzimmer», *Neue Juristische Wochenschrift*, 30, 1975, pp. 1363 ss.

[57] *Cour de Cassation*, 2 December 1981 (D. 1982, I.R. 474).

[58] BGH, 31 March 1970, BGHZ, 53, 369; BG, 17 January 1983, BGE, 109, II, 15.

[59] *Benyon v Nettlefold,* 3 Mac. & G. 94 (1850).

[60] See TORRALBA SORIANO, «Causa ilícita: exposición sistemática de la jurisprudencia del Tribunal Supremo», *Anuario de Derecho Civil*, 3, 1966, p. 703.

[61] «The social judgments of today upon matters of 'immorality' are as different from those of the last century as in the bikini from a bustle,» *Andrews v Parker* [1973] Qs R 93, 104 (Stable J.).

[62] *Neue Juristische Wochenschrift*, 1986, 781. In its ruling of 6 February 2014 (ECLI:ES:TS:2014:247), the Spanish High Court held that it was a practice that undermined «the dignity of the pregnant woman and the child, commodifying the pregnancy and parentage, 'reifying' the pregnant woman and the child.»

[63] JACKSON, *Medical Law, Cases, and Materials,* 2nd ed., Oxford University Press, p. 830.

b. Contracts that restrict freedom of action in a personal and economic context

In all the EU Member States, contracts that restrict or excessively limit freedom of action and business enterprise are considered contrary to financial public policy and, as a result, *ipso jure* void[64]. So then, contracts containing agreements that restrict the freedom to pursue a business or professional or artistic activity usually are void[65]. By the same token, a classic of European case law is the nullity of long-term contracts (normally relating to commercial distribution) that are considered illegal under specific circumstances for unduly restricting financial and professional freedom. There is, of course, no doubt that perpetual contracts (*ad aeternitatem*) are plainly contrary to public policy[66]. Actually, the problem arises in contracts that anticipate an excessive prolongation of the mandatory relationship: in common law, a contract duration of 21 years has been considered illegal[67], whereas German case law has established a maximum duration of 20 years for beer distribution contracts[68].

Agreements that infringe free competition are also the target of criticism in the EU Member States. Restraint of trade or non-compete clauses, which prevent employees from engaging in specific professional occupations for a considerable amount of time after the termination of the original contractual relationship, are very commonplace in certain employment and service contracts. Employers thus seek to prevent their employees, who they have provided with training and technical knowledge, from working for their competitors or starting up their own businesses once their contracts have ended. Agreements of this type also tend to be included in company sales/purchase contracts. The problem resides in the fact that they can prevent workers from finding a job or entrepreneurs from pursuing their business activities. As a rule, it can be said that the validity of non-compete clauses is excluded when, due to their spatial and temporal scope, they involve the de facto deprivation of freedom of work or commerce[69].

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[64] See KÖTZ, «Illegality of Contracts», in BASEDOW et al. (eds.), *The Max Planck Encyclopedia of European Private Law*, Volume I, Oxford University Press, 2012, p. 847.

[65] The judgement *Schroeder Music Publishing Co. v Macaulay* analyses the case of a contract under which a 21-year-old composer—and, consequently, with very limited bargaining power—surrendered all the property rights of his compositions for a period of 10 years to a producer who, nonetheless, was under no obligation to promote him. Moreover, while the producer could terminate the contract at any moment, the composer did not have such a right. The House of Lords understood that the agreement entailed an excessive limitation of the artistic and professional freedom of the young composer and was, as a result, void because it implied an «undue restraint of trade» [(1974) 3 All ER 616]. On the other hand, in a judgement of 14 December 1956 the German High Court (BGH) considered that a contract under which an author ceded, free of charge, the copyrights of all of his future works to a particular publisher limited the former's financial and personal freedom, BGH, 104, II, p. 108.

[66] «Even a contractual relationship which purports to be everlasting may be ended: no party is bound to another for an indefinite period of time.» VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law*, vol. II, p. 705. See the STS 963/1998, Civil, of 26 October 1998 (RJ 1998/8237).

[67] Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd. AC 269 (1968).

[68] BGH, 9 June 1969, *BGHZ*, 52, 171, 176. BGH, 14 June 1972 NWJ 1972, 1459, BGH, 17 January 1979, *Neue Juristische Wochenschrift*, 865 (1979).

[69] «Contracts unduly fettering a person's freedom in the future to carry on his trade, business or profession will be struck down by the courts as being in restraint of trade or contrary to public policy,» in BEALE et al., *Cases, Materials and Text on Contract Law*, p. 304. The so-called «third line forcing agreements» (or «full line forcing» or «tying agreements») are also considered contrary to free competition, see SCHWENZER et al., *Global Sales and Contract Law*, Oxford University Press, 2012, p. 250.

c. Contracts interfering with the due administration of justice

Those contracts whose purpose is to interfere with the due administration of justice have been placed under close scrutiny particularly in the English common law system, which has engendered a rich variety of scenarios regarded as illegal: contracts excluding jurisdiction of the courts[70], contracts perverting the course of justice[71], etc. In the rest of Europe, the precedents are thinner on the ground, yet a brief reference should indeed be made to the *pactum de quota litis*, a controversial issue whereby lawyers' fees (contingent fees) are established in terms of a share of the judgment should the plaintiff win the trial. In the official comments to Article 7:301 DCFR, *pacta quota litis* are included among those contracts that interfere with due administration of justice[72]. However, such an assertion is incorrect as will be seen below when dealing with contracts contrary to a mandatory rule.

d. Contracts contrary to human dignity

European judges and courts are making an increasingly greater use of the criterion of human «dignity» as an intrinsic limit to the private autonomy of contracting parties. Namely, the value of dignity is interpreted as the imperative of non-instrumentalization and non-capitalization of the human body (substantive conception)[73], and therefore Spanish case law has understood that no effect can be given to a wage-earning prostitution contract, due to the fact that it is a sort of «female slavery» contrary to the intrinsic dignity of women[74]. Likewise, the French *Conseil d'État* has considered that the notorious pseudo-sport of «dwarf-tossing» can be banned by the competent French administrative authorities for disrespecting human dignity, this opinion having been confirmed by the Committee of the United Nations[75].

e. Other cases

Lastly, there are many illegal contracts that do not fall into the previous general categories: contracts affecting the freedom and security of marriage[76]; contracts affecting parental

[70] Under common law, those contracts that exclude the jurisdiction of the courts are initially invalid, insofar as their performance could allow the parties to avoid the application of mandatory rules, *Anctil v Manufacturers' Life Insurance Co.*, AC 604 (1899).

[71] Like those marital agreements that are aimed at predisposing useful evidence to obtain a divorce, *Emanuel v Emanuel*, 115 (1946).

[72] VON BAR/CLIVE (eds.), Principles, Definitions and Model Rules of European Private Law, vol. I, p. 536.

[73] As expressed in the Spanish Constitutional Court judgements 53/1985, of 11 April (ECLI:ES:TC:1985:53) and 181/2004, of 2 November (ECLI:ES:TC:2004:181).

[74] Ruling of the STJ-Galicia (Labor Chamber) of 10 November 2004 (ECLI:ES:TSJGAL:2004:4740). In its Resolution of 26 February 2014 [2013/2103(INI)], on sexual exploitation and prostitution and their impact on gender equality, the European Parliament recognized that prostitution, forced prostitution and sexual exploitation «constitute violations of human dignity contrary to the principles of human rights.»

[75] «The Committee considers that [France] has demonstrated [...] that the ban on dwarf tossing [...] did not constitute an abusive measure but was necessary in order to protect public policy, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant.» See ROTH, «Repugnance as a Constraint on Markets», *Journal of Economic Perspectives* 21(3), 2007, pp. 37 ss.

[76] For example, a contract under which someone is prohibited from marrying a particular person by a third party. *Lowe v Peers,* 4 Vurr. 2225 (1768).

responsibility[77]; contracts affecting the state in its relations with other states[78]; contracts promoting corruption in public life[79], contracts to the detriment of a third party[80]; contracts that imply the existence of blackmail and immoral waivers[81]; contracts pertaining to the right to the disposal of one's own body[82]; contracts whose purpose is to defraud the taxpayer[83]; and, among others, contracts under which one of the parties consciously and deliberately takes advantage of the vulnerability of the other party (financial straits, urgent situations, ignorance, lack of experience, etc.) to obtain an excessive and unjust profit[84].

2.3. Contracts contrary to the prohibition of discrimination

The DCFR dedicates a section to the regulation of contracts contrary to the «principle of non-discrimination» (Arts. II. – 2:101-2:2105 DCFR), whose immediate precedent is the treatment of issue in the pertinent community directives and in the Acquis Principles (Arts. 3:101-3:303)[85]. The new «non-discriminatory law» of the EU is basically structured around four directives: on the one hand, two employment directives of the year 2000 (Framework directive for equal treatment in employment and occupation) and 2002 (Amended directive about equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) with a scope and impact on labor law; and, on the other, two general directives of the year 2000 (Racial Equality Directive) and 2004 (Council Directive

[77] Thus, a contract under which parents intend to transfer their rights and obligations as regards their children to a third party is considered illegal, inasmuch as such agreements are «repugnant entirely to their parental duty,» *Humphreys v Polak* (1901), 2 K.B. 385. *Vansittart v Vansittart*, D. & J. 249, 259 (1858).

[78] The arms purchase contract entered into by the United Kingdom to offer military aid to a rebel group in a state controlled by a friendly government was considered illegal, *De Wutz v Hendricks* 2 Bing. 314 (1824).

[79] Which can happen in specific cases of lobbying, *Lemenda Trading Co. Ltd. v African Middle East Petroleum Co. Ltd.*, Q.B. 448 (1988).

[80] In this respect, the following work is a Spanish doctrine classic: GULLÓN BALLESTEROS, «En torno a los llamados contratos en daño a tercero», *Revista de Derecho Notarial*, 20, 1958, p. 111.

[81] Like the free transfer of a property in exchange for the pledge to conceal the existence of a specific tax contravention from the administration [STS, Civil, of 11 December 1986 (ECLI:ES:TS:1986:6954)].

[82] French case law has considered a contract for extracting and selling a tattoo contrary to morality and therefore illegal, TGI Paris, 3 June 1969 (D. 1970).

[83] *Cour d'appel Pau*, 16 October 1956 (D. 1957, 17).

[84] See ZIMMERMANN, *The Law of Obligations: The Roman Foundations of Civilian Tradition*, Oxford University Press, 1996, p. 715; KÖTZ/PATTI, *Diritto europeo dei contratti*, Giuffré, 2006, p. 274 (Italian translation by BUCHBERGER). In this connection, the German Constitutional Court (*Bundesgerichshof*) regards contracts under which there is an excessive imbalance between the service and return of each party as void—for being contrary to good morals (BGH 19 January 2001). See FINKENAUER, «Laesio Enormis», in BASEDOW, Jürgen et al. (eds), *The Max Planck Encyclopedia of European Private Law*, vol. II, 2012, pp. 1031. In Spain, the STS 322/1993, Civil, 5 April (ECLI:ES:1993:2299) reached the conclusion that «it is inadmissible that, in rule of law, a public body (such as a city council) should attempt to take advantage of the distressing financial situation of a creditor in order to obtain a partial cancellation of the debt from him or her.»

[85] Concerning protection against discrimination in European contract law, Acquis Principles and in the DCFR, *see* SCHULZE (ed.), *Non-Discrimination in European Private Law*, Mohr Siebeck, 2011; VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law*, vol. I, pp. 165 ss.; LEIBLE, «Non-Discrimination», in SCHULZE (ed.), *Common Frame of Reference and Existing EC Contract Law*, 2nd ed., Sellier European Law, 2009, pp. 127 ss.; NEUNER, «Protection Against Discrimination in European Contract Law», *European Review of Contract Law,* 1, 2006, pp. 35 ss.; BERGER, «Privatrechtlicher Diskriminierungsschutz als Grundsatz im Gemeinsamen Referenzrahmen für Europäisches Vertragsrecht», *European Review of Private Law*, 16, 2008, pp. 847-70; LEIBLE/NAVAS NAVARRO/PISULINSKI/ZOLL, in «Art: 3:101», in RESEARCH GROUP ON EXISTING EC PRIVATE LAW (ACQUIS GROUP), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I: Pre-Contractual Obligations. Conclusion of Contract*, Sellier, 2007, p. 109; GRIGOLEIT/TOMASIC, «Acquis Principles», in BASEDOW/HOPT/ZIMMERMANN (eds.), *Max Planck Encyclopaedia of European Private Law*, Oxford University Press, 2012, p. 7.

implementing the principle of equal treatment between men and women in the access to and supply of goods and services) with an impact on private law[86]. Thus, in the aforementioned directives special attention was already being given to the protection against discrimination before the publication of the DCFR, through the articulation of a series of specific instruments and measures[87].

Consequently, the principle of non-discrimination (positive formulation of the principle of equality) and the prohibition of discrimination (negative formulation) were incorporated by different states into their legal systems in several ways. These principles not only now embrace labor or employment relations, as has been the case hitherto, but also contractual relationships. The material scope of reference is the «access to and availability of goods and services» (to wit, the private procurement sector when there is a public tender) and the discriminatory motives regarded as worthy of special attention in this field are principally—though not exclusively—the gender and ethnic or racial origin of people.

For the purpose of legally reinforcing the protection against discrimination, some states have implemented sweeping laws relating both to this new scope of protection of individuals against providers of goods and services and to others in which discrimination should be prescribed (employment relations, social security, public services). In appearance, and even in name, these laws tend to have certain all-encompassing pretensions from the moment at which they are called «integral» or «general», for they are aimed at fundamental sectors of the legal system or, at least, at a wide range of subjects.

The most significant example is the German General Equal Treatment Act of the 14 August 2006 (*Allgemeines Gleichbehandlungsgesetz* – AGG)[88]. What is involved is a «general law» that encompasses broad areas of the legal system (primarily, labor law, contract law and public-sector law) and includes practically all the typical reasons for prohibiting discrimination (ethnic or racial origin, religion, gender, age, sexual orientation and disability)[89]. According to FREEDLAND and LEHMANN, the name chosen—i.e. «general law» (*allgemeines Gesetz*)—is however

[86] Council Directive 2000/43/EC of 29 June implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (DOCE, no. 180, 19 July 2000, 022-0026), whereby all types of discrimination in the workplace are prohibited. Council Directive 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation (DOCE, no. 303, 2 December 2000, 0016-0022). Council Directive 2002/73/CE, of 23 September 2002, to amend Council Directive 76/297/CE on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (DOCE, L 269, 5 October 2002, 0015-0020). Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (DOCE L 373, 21 December 2004, 0037-0043).

[87] In spite of the undeniable influence of North American law on the initial shaping of EU non-discrimination law, the current situation is very different owing to the fact that decades of political and social backlash in the USA have ended up significantly weakening the corpus of non-discrimination laws stemming from the struggles of civil rights movements, and the courts have become an ideological battleground. See DE BÚRCA, «The Trajectories of European and American Antidiscrimination Law», *American Journal of Comparative Law*, 60, 1, 2012, p. 1. On the study of the prohibition of non-discrimination in the CEDH, see GERARDS, «The Discrimination Grounds of Article 14 of the European Convention on Human Rights», *Human Rights Law Review*, 13, 1, 2013, pp. 99 ss.

[88] BGBl. I, 1897. In force since 18 August 2006, amended by Art. 8 of the Act of 2 December 2006 (BGBl. I, 2742), and more recently by the Act of 12 December 2007 (BGBl. I, 2742).

[89] For a technical analysis, see BUSCH et al., *Das Allgemeine Gleichbehandlungsgesetz*, Bund, 2009; THÜSING, «Allgemeines Gleichbehandlungsgesetz», in SÄCKER at al. (eds.), 7th ed., *Münchener Kommentar Zum BGB,* vol. 1-AGG, 2015.

rather misleading for two reasons. Firstly, because the aim of the AGG is not always equal treatment: some of its provisions simply prohibit discriminatory treatment and do not aim at full equality. Secondly, it does not establish a general framework for non-discrimination, but covers specific areas in which discriminatory acts may occur[90]. In Germany, it is generally accepted that it does not form part of a constitutional framework of contract law, since it is perceived as a «specific regulatory strategy», rather than a general principle of law[91].

Another example of a general law in this respect is the English Equality Act of 2010[92], which forms part of English and Welsh law and, apart from Section 190 (improvements to let dwelling houses) and Part 15 (family property), Scottish law too[93]. Although this act has a massive scope, it cannot be said that it has a significant effect on (private) contract law or on hallowed English common law, insofar as it does not imply, according to the general perception of English jurists, an imposition of the constitutional principle of non-discrimination on contract law. Actually, all anti-discriminatory legislation is perceived as an element of statute law which does not need to be classified in the framework of private law for being—simply—a statute law[94]. This act amends up to nine previous rules[95] and has 14 sections and 28 schedules which embrace a vast range of issues (public services, premises, education, associations, contracts, disabled persons and family assets). Part 10 is entitled, «contracts», but only declares the inefficiency of contractual clauses, collective bargaining agreements and commitment rules that imply some sort of illegal discrimination, mobbing or victimization[96]. The scope of the

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[90] FREEDLAND/LEHMANN, «Non-discrimination and the 'Constitutionalization of Contract Law'», in DANNEMANN/VOGENAUER (eds.), *The Common European Sales Law in Context. Interactions with English and German Law*, Oxford University Press, 2013, p. 173. The reason why German lawmakers chose such an all-encompassing title is due—as claimed by these authors—»to the intention of the government of the day (a coalition of the Social Democrats and the Green Party) to extend the application of non-discriminatory rules to other areas than those covered by EU Law» (see p. 174).

[91] This diagnosis has been reached after a thorough analysis performed by FREEDLAND/LEHMANN, *The Common European Sales Law in Context*, p. 169, who, attempting to break with the traditional view, point to other possible ways of understanding the principle of non-discrimination in contract law. For these authors, «the idea of the 'constitutionalization of contract law' identifies a panoply of possibilities for the imposition of 'constitutional principles' upon, or the embodiment of 'constitutional principles' within, contract law» (see 160). For his part, GRÜNBERGER can be regarded as one of the authors who have attempted to do just that with a more revolutionary approach. Versus the traditional view that envisages any restriction to contractual freedom as an exception that requires a legal justification, this author argues that there should be a «principle of personal equality» (*Prinzip der personalen Gleichheit*). In accordance with this, the question is not «when and why a private subject should treat someone else equally», but «when and why this should not be the case». Thus, the justification of all unequal treatment in private law should be necessarily analyzed. See GRÜNBERGER, *Personale Gleichheit. Der Grundsatz der Gleichbehandlung im Zivilrecht*, Nomos, 2013, p. 840.

[92] Equality Act 2010 (c15) which received Royal Assent on 8 April 2010. On the state of affairs before it was enacted, see MALIK, «Anti-Discrimination Law in Britain», in BEAT/MAHLMANN (eds.), *Handbuch Gleichbehandlungsrecht*, Nomos, 2007, p. 135. For an analysis of the act after Brexit, see WINTEMUTE, «Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?», *King's Law Journal*, 27, 3, 2016, pp. 387-397.

[93] Only a few precepts form part of Northern Irish law. See GOVERNMENT EQUALITIES OFFICE, *Explanatory Notes on Equality Act*, 8, rev. ed., 2010.

[94] In this connection, *see* FREEDLAND/LEHMANN, *The Common European Sales Law in Context*, p. 173. For an overview, see BEATSON, «The Role of the Statute in the Development of Common Law Doctrine», *Law Quarterly Review*, 117, 2001, p. 247.

[95] Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006 Part 2, Equality Act (Sexual Orientation) Regulations 2007.

[96] See Explanatory Notes on Equality Act, 2010, pp. 101 ss.

English act is more restricted than that of the German law. Nonetheless, the list of prohibitions that the former envisages is very long: age, disability, gender reassignment, marriage and civil union, pregnancy and motherhood, race, religion or beliefs, gender and sexual orientation[97].

Other countries have preferred to address protection against discrimination in the field of contract law through the enactment of specific legislation. Especially noteworthy in this regard is Scandinavia whose legal experiences go beyond the scope of the prohibition of discrimination established in community law. Rather than focusing on particular kinds of contracts or tenders («goods and services», «public tenders»), these countries have even included the prohibition of gender discrimination in purely private contracts[98].

Spain is yet another example of the preference for specific legislation, although with more limited repercussions on private law as a whole than in Scandinavia. For this reason, the principle of equal treatment for men and women and the prohibition of discrimination are provided for in *Ley Orgánica* 3/2007, of 22 March, for the effective equality between men and women[99], a cross-cutting piece of legislation that embraces, in accordance with European and North American trends (gender mainstreaming), the entire legal system[100].

Unlike the PECL, where the issue is not addressed, the DCFR is firmly committed to introducing on a general basis a number of rules that flesh out the principle of non-discrimination[101]. They are covered in Chapter 2 («Non-discrimination»), Book II[102]. In Chapter 1, Book III, besides

[97] Equality Act 2010, Part 2, Chap. 1.

[98] Danish gender equality law is applicable to entrepreneurs and civil servants and any public activity, Finnish gender equality law to «the entire social spectrum», except those expressly excluded, and Norwegian gender equality law «in all areas», barring those pertaining to the internal matters of religious communities. See a brief reference in LEHMANN, «La prohibición de la discriminación en los derechos nacionales», in FERRER VANRELL/MARTÍNEZ CAÑELLAS (coords.), *Principios de derecho contractual europeo y principios de UNIDROIT sobre contratos comerciales internacionales,* Dykinson, 2009, p. 204.

[99] BOE 71, of 23 March 2007.

[100] See VALPUESTA FERNÁNDEZ, «La Ley Orgánica para la igualdad efectiva de mujeres y hombres», *Teoría y derecho: revista de pensamiento jurídico*, 1, 2007, pp. 264 ss.; GARCÍA RUBIO, «Discriminación por razón de sexo y Derecho contractual en la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres», *Derecho privado y Constitución*, 21, 2007, pp. 131 ss.; AGUILERA RULL, *Contratación y diferencia. La prohibición de discriminación por sexo y origen étnico en el acceso a bienes y servicios*, Tirant Lo Blanch, 2013, p. 237; INFANTE RUIZ, «La perspectiva de género en el Derecho de los contratos. Luces y sombras del nuevo Derecho antidiscriminatorio», in INFANTE RUIZ (coords.), *Construyendo la Igualdad. La feminización del Derecho privado*, 2017, pp. 145 ss.

[101] The precedents of this regulation are described in the works of the «Working Group on Non-Discrimination» and in the draft of a number of general principles relating to non-discrimination formulated by the said group. See LEIBLE, «Non-Discrimination», *ERA – Special Issue European Contract Law*, 2006, pp. 76 ss.

[102] This rule is developed in five articles. Art. 2:101 declares that all contracting parties have «a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act whose object is to provide access to or supply goods, other assets or services which are available to the public.» Art. 2:102 defines the concept of (both direct and indirect) «discrimination», which also includes any type of harassment, including conduct of a sexual nature, as well as any instruction to discriminate. In Art. 2:103, an exception is established for the purpose of preventing the principle from being inflexible: there will be no discrimination when unequal treatment «is justified by a legitimate aim if the means used to achieve that aim are appropriate and necessary.» The following precept (Art. 2:104) provides for a system of remedies for infringing the prohibition of discrimination. This article does not envisage a specific system of remedies but refers to the rules governing the non-performance of obligations provided under Book III, Chapter 3 (including compensation for pecuniary and moral damages), without prejudice to the possibility of granting any available remedy in accordance with the rules of tort liability set out in Book IV. The granting of any remedy for discrimination must be in accordance with the guidelines established in the second paragraph of Art. 2:104: this

others of obligation, there is a general allusion to this principle. What is involved, therefore, is a principle that sheds light on all the facets of contract law and law of obligations and makes the battle against discrimination in private law unprecedentedly effective[103].

With respect to this regulation, if one considers Article II. – 7:301 DCFR and its precedent in the PECL (Art. 15:101) in which, as has already been noted, a contract is declared void to the extent that it infringes a principle recognized as fundamental in the legal systems of the EU Member States, as well as the official comments that contend that this formulation also refers to the principles set out in the Founding Treaty, the Convention of Human Rights and the Charter of Fundamental Rights[104], it can logically be claimed that a discriminatory contract can also be an immoral one, i.e. a contract contrary to the fundamental principles of the EU. The prohibition of discrimination (the right not to be discriminated against) is a fundamental principle deriving from both EU primary law and its express formulation in the anti-discrimination directives. Any breach of this nature can be understood as a contract infringing fundamental principles (Art. II. – 7:301 DCFR). In this regard, a distinction should be drawn between an immoral discriminatory contract and one whose performance or enforcement gives rise to discrimination. In the first case, the judge can establish the nullity of the contract or the part of which is discriminatory (Arts. 15:101 PECL and II. – 7:301 DCFR), together with compensation for damages in such an event, which could even serve as a deterrent (Art. II. – 7:304 DCFR, in connection with Art. II. – 2:104 DCFR). As to the second case, in the event of an infringement the corresponding remedies adapted to the particular case must be granted, as provided for in Article II. – 1:105 DCFR.

3. Contracts infringing mandatory rules

3.1. Introduction

Generally speaking, in the different European systems the legal treatment of the issue of illegal contracts can be grouped into three models: (1) Legal systems with a Roman-canonical tradition[105] which are characterized by the French influence of *cause illicite* and/or the existence

«should be proportionate to the injury or anticipated injury; the dissuasive effect of remedies may be taken into account.» Lastly, Art. 2:105 regulates the burden of proof by introducing a rule very similar to that coined by community case law as regards labor discrimination: the reversal of the burden of proof in favor of the plaintiff, provided that he or she «establishes, before a court or another competent authority, facts from which it may be presumed that there has been such discrimination (*fumus iuris*).»

[103] For the reasons behind this incorporation, see VON BAR et al. (eds.), «Introduction», in *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, No. 20, No. 23, Nos. 25-6 and No. 31, Interim Outline, Sellier European Law, 2008, pp. 1 ss.

[104] LANDO et al, Principles of European Contract Law, Part III, p. 211; vol. 1, Draft Common Frame of Reference, Full Edition, II. – 7:301 DCFR, Comment B, p. 536; see also MACQUEEN, in La Tercera Parte de los Principios de Derecho Contractual Europeo, p. 553.

[105] Art. 1133 of the French CC (*cause illicite*), in its historical version before the reform of 2016, and the new Art. 1162 (*nullité du contrat pour but contraire à l'ordre public*); Art. 1133 of the Belgian CC (*cause illicite*); Arts. 1345 (*motivo illecito*) and 1418 (*cause di nullità del contratto: contrario alle norme imperative*) of the Italian CC; Art. 281 of the Portuguese CC (*fim contrario à lei*); Arts. 6.3 (*actos contrarios a las leyes imperativas*) and 1275 (*causa ilícita*) of the Spanish CC. *See* an interesting comparative study of legal cause in Chapter VI of the book by FAIRGRIEVE, *Comparative Law in Practice: Contract Law in a Mid-Channel Jurisdiction*, Hart, 2016. See also VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law,* vol. 1, Art. II.-7:302, Note I, p. 544.

of rules governing the effectiveness of acts contrary to mandatory rules[106]; (2) the legal systems with a Germanic tradition in which the concept of cause does not exist and illegal contracts are covered in the general clause on legal transactions contrary to the law (*gesetzliches Verbot*)[107]; and (3) English common law in which there is no general provision, but indeed the doctrine of statutory illegality which groups together a series of cases with a varied range of effects: express prohibition; implied prohibition; illegal performance; statute imposing only a penalty; void contracts; contracts unenforceable by one party; and contracts not void or unenforceable[108].

3.2. Scope of application and forms of contravention of the law

Articles 15:102 PECL[109] and II. – 7:302 DCFR[110] state that when a contract infringes a mandatory or prohibitive rule of law, «the effects of that infringement on its validity are the effects, if any, expressly prescribed by the mandatory rule», and in the absence of provisions in this respect, the judge may declare the validity, total or partial nullity with retroactive effect or the modification of the contract or its effects in accordance with a series of factors[111]. The

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[106] On the suppression of the requirement of cause in current French contract law, *see* footnote 4 above. See *Rapport au Président de La République.* See AYNES, «La cause, inutile et dangereuse», *Droit & Patrimoine*, 2014, 240, p. 240. Concerning the doubts raised by the introduction of the new contract content notion (*contenu du contrat*), see FABRE-MAGNAN, «Critique de la notion de contenu du contrat», *Revue des contrats*, 3, 2015, p. 639; SAVAUX, *La Semaine Juridique*, p. 20; WICKER, «La suppression de la cause par le projet d'ordonnance: la chose sans le mot?», *Recueil Dalloz*, 27, 2015, p. 1557; SCHÜTZ, *La formation du contrat dans le nouveau droit français des obligations*, manuscript of the authoress; FRANÇOIS, «Présentation du nouveau chapitre II 'La formation du contrat'», in *La réforme du droit des contrats présentée par l'IEJ de Paris 1*, available at https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre3/stitre1/chap2/. Since 1998, French case law (*Cass. civ. 1re*, 7 Oct. 1998, no. 96-14.359) holds that it is unnecessary that the illegal character of a contract be intended, or even known, by all the contractual parties in order to terminate it. This solution is also applied to the new nullity of contract for a purpose contrary to public policy (*nullité du contrat pour but contraire à l'ordre public*) of Art. 1162. Thus, FRANÇOIS states that «the function of nullity for an illegal cause is therefore entirely preserved through the new notion of contractual objective.»

[107] § 134 BGB (Gesetzliches Verbot); § 879 ABGB (Gesetzliches Verbot); sec. 6:95 of the new Hungarian CC (illegal contracts); Art.1.80 of the Lithuanian CC (nullity of a transaction that does not correspond to the requirements of mandatory statutory provisions).

[108] BEATSON et al. (eds.), *Anson's Law of Contract*, 30th ed., Oxford University Press, 2016, p. 410. Cfr. AMERICAN LAW INSTITUTE, *Restatement (1st) on Contracts,* § 599.

[109] MACQUEEN, in La Tercera Parte de los Principios de Derecho Contractual Europeo, p. 556; LANDO et al. (eds.), Principles of European Contract Law, Part III, p. 213.

[110] VON BAR/CLIVE (eds.), Principles, Definitions and Model Rules of European Private Law, vol. 1, II.-7:302, 2010, p. 538.

[111] Our analysis focuses on European law. But the latest versions (2016 and 2010) of *The UNIDROIT Principles of International Commercial Contracts*, which contains a similar rule in Section 3 («illegality») missing from previous editions—Art. 3.3.1 («contracts infringing mandatory rules») and 3.3.2 («restitution»)—should not be overlooked. In this case, the influence of the PECL is evident. With respect to the 2004 version, BONELL, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts,* 3rd ed., Transnational, 2005, p. 365), declares that, as regards the future prospects of these principles, «a first problem to arise will be the very concept of 'illegality',» before posing a number of questions that summarize the current state of affairs: «should the Principles provide an autonomous definition of 'illegal' (and 'immoral') contracts or for that purpose merely refer to the mandatory rules of national, supranational or international origin applicable by virtue of the relevant rules of private international law? And if the first approach is taken, how would illegal contracts be defined (e.g. contracts contrary to 'internationally recognised fundamental rights and values')? Moreover, what would be the consequences of illegal (and immoral) contracts? Should they always have no effect at all or could they possibly have some effect to be determined according to the circumstances? And what should be the criteria for determining the solution to be adopted in a given case?» For the 2010 edition of the PICC, see, among others, CUNIBERTI, in VOGENAUER (ed.), *Commentary on the Unidroit Principles of*

general heading of these precepts refers to contracts that infringe necessary law, literally alluding to «contracts infringing mandatory rules», which doubtless encompasses both mandatory and prohibitive rules of law. These precepts do not indicate when a contract is deemed illegal, but that in order to determine the infringement the concluded contract must be compared with the factual situation of the concrete rule of prohibition, which is consistent with the legal technique of all legal systems that sanction the infringement of illegal contracts.

The reality of all the European legal systems is that there are many contracts considered illegal because they infringe mandatory or prohibitive rules of law, even though they do not contravene good morals or public policy, or any fundamental principle. Thus, implicit in this logic is that when the infringement also affects the moral domain, the precept referring to it should be applied[112]. Furthermore, certain legal systems establish that immoral contracts are illegal or contrary to the law or simply do not envisage different legal consequences for contracts contrary to the law or to morality or public policy[113], and accordingly should be addressed in this category.

The infringement of a mandatory or prohibitive rule can stem from a series of causes or factors, such as who concludes the contract (e.g. laws that prohibit the hiring of certain people because of their positions or professions), how it has been concluded (e.g. laws that impose a specific form or compliance with a formality), its content or purpose (e.g. laws that proscribe particular contractual content or impose a specific kind), or how the contract should be maintained during its performance (e.g. in the case of administrative laws that make a contract validly concluded inefficient, even though this issue differs from that of the original invalidity for contravening the law). The range of reasons or causes that lawmakers take into consideration when establishing mandatory rules is enormous and probably unfathomable if the analysis focuses on a broad range of legal systems.

Extracting the possible scenarios, the classification proposed by SCHWENZER, HACHEN and KEE can help to identify the most common kinds of contracts contravening the law. The four scenarios are—according to the aforementioned authors[114]—as follows (observations of our own have been included).

International Commercial Contracts (PICC), 2nd ed., Oxford University Press, 2015, pp. 556 ss.; specifically, on the issue of «illegal contracts», UNCETA LABORDA, «Principios de UNIDROIT e ilicitud del contrato internacional», *Cuadernos de Derecho Transnacional*, 5, 2, 2013, pp. 620 ss., and for a comparison with American law, GABRIEL, «An American Perspective on the 2010 UNIDROIT Principles of International Commercial Contracts», *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2013, p. 166.

[112] In practice, these are the least important infringements in the legal system, which allows for a more flexible legal treatment of the topic. See MACQUEEN, *La Tercera Parte de los Principios de Derecho Contractual Europeo*, p. 556; LANDO et al (eds.), *Principles of European Contract Law,* Part III, p. 214.

[113] This is not only the case of causalist approaches in which the concept of illegal cause encompasses both the contravention of the law and that of good morals, although—as will be seen—some of them have evolved towards not only the differentiation of effects, but also that of some Germanic, Central European and Eastern European countries: § 879 ABGB (*gegen ein gesetzliches Verbot oder gegen die guten Sitten*); Art. 200 (2) of the former Hungarian CC; Art. 85 (1) of the current Slovenian CC (contract that contravenes the constitution, compulsory regulations or moral principles).

[114] SCHWENZER et al., *Global Sales and Contract Law*, pp. 247 ss.

a. Contract itself illegal

This is one of the cases in which the law establishes that a particular transaction is in itself illegal, the degree of knowledge of the parties as regards the law being irrelevant. To our mind, this form of contravention is contemplated first and foremost in the old civil codes; hence the legal consequence envisaged is the most severe sanction, viz. nullity or ineffectiveness.

b. Content of contract contrary to law

In this case, the product purchased or the obligation deriving from a contract is illegal, either because the parties have negotiated with banned products or services or because contractual performance has resulted in an act contrary to the law. Concerning this distinction, it should be stressed that when one refers to contracts whose content is illegal because the product or service is banned by law, in civil law systems this category is traditionally realigned with the subject-matter of the (illegal) object of a contract, to whose particular rules recourse should be made as a matter of course. In any case, the distinction between illegal cause and illegal object has been the subject of a long-standing debate—a subject which will not be broached here—which, in a way, feeds on itself. The ordinance of the reform of the French Civil Code in 2016 aimed to remove it at one fell swoop with the introduction of rules governing the illegal content of contracts, which has not been immune from criticism, as already noted above.

c. Contract fortuitously performed contrary to the law

In this type of contract, neither the contract per se nor its content is illegal, but some aspect of its performance has been developed in such a way as to make it contrary to the law; unlike the case commented above, the illegal act does not form part of the contract, but simply happens. In such a case, these acts do not affect the validity of a contract, yet they can determine sanctions for the subjects who contravene the law. In our view, this is not normally equivalent to the contravention of the law envisaged in the old civil codes.

d. Contract intended to achieve a prohibited purpose

Here, one or both parties enter into a contract for the purpose of committing an illegal act. It would appear that what is involved is the second model of illegality traditionally contemplated in the old civil codes. The envisaged legal consequence in these cases is usually nullity. But as the aforementioned authors have noted, in this category it is necessary to look beyond the object of the contract and focus instead on the matter intended in its effects, namely, to examine why the parties have entered into it. Thus, the seriousness of an illegal act can be a factor when determining the validity of a contract. This last model, more inherent to common law, is foreign to the most traditional civil codes.

Both the PECL and the DCFR refer to the rules of necessary law. However, Article 1:103 PECL (expressly mentioned in 15:102) draws a distinction between two types of mandatory rules[115]: (a) national rules of necessary law; and (b) rules applicable, without consideration, to the law chosen to govern a contract in accordance with the relevant rules of private international law.

[115] MACQUEEN, in La Tercera Parte de los Principios de Derecho Contractual Europeo, p. 550; LANDO et al (eds.), Principles of European Contract Law, Part III, p. 214.

This distinction is also found in Article 7 of the Convention of Rome of 1980 on the law applicable to contractual obligations, which states that when the law of a particular country is applied, effect may be given to the mandatory rules of another country with which the situation has a close connection, insofar as such rules, according to the law of the latter, are applicable regardless of the law governing the contract.

The distinction found in the PECL is not included in the DCFR[116], so in Article II. – 7:302 of the latter no reference is made to applicable mandatory or prohibitive rules. The reason for this resides in the fact that the DCFR widens the scope of autonomy of the contracting parties, thus allowing them to choose any necessary rule of law as that applicable to the contract. This is the most notable difference between both regulations, since Article II. – 7:302 does not otherwise amend Article 15:102 PECL, barring a few style corrections.

3.3. Common cases

The range of contracts contrary to mandatory or prohibitive laws is colossal, unmanageable and often inextricable if we take into consideration the current state of affairs in the different European States in a study of comparative law. Inquiring into relevant cases is also a very complex task, even when focusing on the legal system of one sole state. Evidently, all the European States establish rules prohibiting certain conducts or which condition the acceptability of certain acts to a corresponding authorization, with a view to furthering their own economic, social and political interests. This is the reason behind such a large variety of scenarios. On this point, jurists cannot but standardize some case groups.

To avoid being exhaustive, in the following paragraphs we will only address a number of common cases of the legislative reality of some European countries[117].

a. Laws for the defense of competition

The legislations of all European states, and practically the world over, protect free competition and participation in the marketplace. These envisage the invalidity of contracts or agreements between entrepreneurs that lead to a restriction of competition, might alter production or market conditions, or distort competition. The fundamentals of the system for the protection of competition in the EU can be found in Articles 101 (cartels) and 102 (abuse of dominant

[116] The Rome Convention was substituted by Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I) [Official Journal L 177 of 4 July 2008]. See in general MCPARLAN, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford University Press, 2015; MAGNUS/MANKOWSKI, *Rome I Regulation*, Sellier European Law, 2015; FERRARI/LEIBLE (eds.), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier European Law, 2009.

[117] As regards English law, see TREITEL's excellent cataloguing (statutory invalidity) standardized by subject, *The Law of Contract*, 10th ed., Sweet & Maxwell, 1999, p. 473; or the equally excellent cataloguing (statutory illegality) by BEATSON et al., in *Anson's Law of Contract*, 30th, p. 410. In the case of German law, see the exhaustive cataloguing by HEFERMEHL, Wolfgang, in WOLF, Manfred/ SOERGEL, Hans-Theodor (ed.), *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Volume 2, Kohlhammer, 1999, § 134 – *Gesetzliches Verbot,* Rn. 50 ss.; and MAYER-MALY/ARMBRÜSTER, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Volume 1, 7th ed., C.H. Beck, 2015, § 134 - *Gesetzliches Verbot*, Rn. 50 ss..

position) of the Treaty on the Functioning of the EU (TFUE)[118]. The European Commission itself, the highest community body responsible for (among other things) safeguarding the institutional guarantee of competition, states that competition rules serve to guarantee companies fair and equivalent conditions, while taking into account the interests of innovation, unified technical standards and small business development. According to these rules, companies cannot fix prices or divide markets amongst themselves, abuse their dominant position in a specific market to expel their competitors or merge with each other for the purpose of acquiring a controlling position in the market. Yet, at the same time, these rules are applied with common sense and flexibility (exceptions are foreseen[119]) following the basic criterion of determining whether the agreement will benefit consumers or damage other companies[120]. With respect to these fundamentals, each Member State is empowered to establish mechanisms for the defense of competition in its territory and to provide the adequate instruments and institutional structure to ensure that free competition is real and effective in the marketplace[121].

The general sanction for contravening the prohibitions provided for in competition laws tends to be the automatic nullity of the agreements, decisions or recommendations that are not envisaged in any exemption or exception[122].

b. Insurance activity management laws

These laws establish the obligation for all the EU Member States under which all insurance activities must be necessarily performed by a particular type of company and can only be carried out with the pertinent administrative authorization. By the same token, there are laws that establish the obligation of exclusivity for certain classes of insurance[123]. National

[118] Former Arts. 81 and 82 of the Treaty Establishing the European Community. See KOENIG et al., *European Competition Law in a Nutshell*, Lexxion, 2011, and for a comprehensive analysis, CASTILLO ORTIZ, *EU Treaties and The Judicial Politics of National Courts: A Law and Politics Approach*, Edward Elgar, 2016.

[119] For example, the Member States are allowed to help new companies or those in crisis if they have real possibilities of being profitable, thus preserving jobs or even creating new ones. Similarly, they can also help companies cooperating in the drafting of a unified technical standard for the market as a whole, small companies cooperating so as to be able to compete better with larger ones, and in research and innovation initiatives and in regional development projects.

[120] DIRECTORATE-GENERAL FOR COMMUNICATION (EUROPEAN COMMISSION), *Competition. Making markets work better*, 4 (Publications Office of the European Union, 2016), available at http://europa.eu/!bY34KD.

[121] There is a profusion of laws in different countries, including, among others, the German law against limitations on competition (*Gesetz gegen Wettbewerbsbeschränkungen* - GWB) of 26 June 2013; the English Competition Act of 1998; the French Commercial Code (*Code de commerce*, Livre IV: De la liberté des prix et de la concurrence); and the Spanish Defense of Competition Act (*Ley 15/2007*) of 3 July 2007.

[122] Art. 101.2 TFUE: «Any agreements or decisions prohibited pursuant to this Article shall be automatically void»; § 1 GWB («Verbot wettbewerbsbeschränkender Vereinbarungen») and § 134 BGB-*Gesetzliches Verbot* («[…] ist nichtig […]»); S. 2 (4) Competition Act 1998: «Any agreement or decision which is prohibited by subsection (1) is void»; Art. L420-3 *Code de commerce:* «Est nul tout engagement, convention ou clause contractuelle se rapportant à une pratique prohibée par les articles L. 420-1, L. 420-2, L. 420-2-1 et L. 420-2-2»; Art. 1.2. Ley española de Defensa de la Competencia: «Son nulos de pleno derecho los acuerdos, decisiones y recomendaciones que, estando prohibidos en virtud de lo dispuesto en el apartado 1, no estén amparados por las exenciones previstas en la presente Ley.»

[123] Worthy of mention is the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009, on the taking-up and pursuit of the business of Insurance and Reinsurance, known as *Solvency II*, in force since 1 January 2016, which requires insurance companies to possess sufficient financial resources and establishes management and supervision standards.

legislations[124] normally prohibit insurance companies from engaging in certain activities under the sanction of the automatic nullity of the acts, agreements or contracts that envisage them: insurance companies are usually prohibited from engaging in activities that are not directly related to the insurance business or which do not comply with the risk management inherent to these companies through the so-called «actuarial basis»[125].

c. Laws against illegal employment

These laws establish the prohibition of hiring labor without the appropriate register in the social security system or the obligation to register all employment contracts, as well as the corresponding sanctions in the event of contravention[126]. Such sanctions are normally of an administrative nature (they establish the obligation to register contracts and the corresponding fines) and, by virtue of the principle of worker protection, do not affect the validity of an employment contract, provided that an unregistered contract does not represent an infringement of basic workers' rights, and often establish the conversion or adaptation of a contract to the mandatory rule in question[127].

d. Gaming and betting laws

The regulation of gaming and betting contracts is commonplace in the administrative laws of different countries[128]. They define the circumstances under which gaming contracts and betting are illegal and establish the conditions of effectiveness of authorized gaming and betting through regulating licenses and registering companies engaged in these activities. Any gaming or betting that does not comply with the requirements of these general laws is void in all legislations, and civil codes do not usually allow for gains-related claims[129]. For its part, English

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[124] See, among others, Insurance Companies Act 1973, 1980 and 2015 (English laws pertaining to insurance companies); *Versicherungsaufsichtsgesetz – VAG*, of 1 April 2015 (German law on the supervision of insurance companies); *Ley 20/2015*, of 14 July, *de ordenación, supervisión y solvencia de las entidades aseguradoras y reaseguradoras – LOSSCS* (Spanish law on the activity and supervision of insurance companies).

[125] See, for instance, § 15 VAG (Versicherungsfremde Geschäfte), Art. 5 LOSSCS (Operaciones prohibidas a las entidades aseguradoras).

[126] For example, in Germany the Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung, of 23 July 2004 (SchwarzArbG); in France, Arts. L 8221-1 et seq. of the Code du travail on «travail dissimulé» or «clandestine»; and in Spain, Ley 13/2012 de lucha contra el empleo irregular y el fraude a la Seguridad Social, of 26 December.

[127] See in general RENOOY et al., *Undeclared work in an enlarged Union. Final report. European Commission*, 2004; INTERNATIONAL LABOUR ORGANIZATION. *Labour inspection and undeclared work in the EU* (LAB/ADMIN), Working Document No. 29 (Geneva, 2013).

[128] In England, the Gambling Act 2005 replacing the Gaming Act 1845; in Germany, the *Verordnung uber offentliche Spielbanken – SpielbkV* (Regulation of gambling casinos), of 27 July 1938 and the *Glücksspielstaatsvertrag* (State agreement of the *Länder* on gambling), of 1 January 2008; in Switzerland, the *Verordnung über Glücksspiele und Spielbanken* (*Spielbankenverordnung - VSBG*), of 24 September 2004; in France, *Loi n° 2010-476 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne*, of 12 May 2010; and in Spain, *R.D.L.*, of 25 March 1977, *por el que se regulan los aspectos penales, administrativos y fiscales de los juegos* and *Ley 13/2011*, of 27 May, *de regulación del juego*. For the state of the question regarding different legislations, see HÖRNLE/ZAMMIT, *Cross-border Online Gambling Law and Policy*, Edward Elgar, 2010.

[129] This is a general tendency in Roman French law, for Art. 1965 of the *Code Civil* establishes, «La loi n'accorde aucune action pour une dette du jeu ou pour le paiement d'un pari»). There are different variations on this theme in other European civil codes (for example, Art. 1965 of the Belgian CC; Art. 1933 of the Italian CC; Art. 1795 of the Spanish CC; and Art. 1245 of the Portuguese CC). In also appears in the civil codes of German-

law distanced itself from this rule with the Gambling Act of 2005, which establishes that a gaming-related contract can be performed, provided that it is not illegal in any other way[130].

e. Pactum de quota litis

Some legal systems have readily endorsed this agreement, even in its most pure form (*quota litis stricto sensu*) as a contingent fee. Under this form of payment, lawyers agree to accept a portion of the sum in litigation in lieu of their normal fee if they win the case for their client, coming away empty handed if they lose it. This agreement is fully recognized in the USA, where it is common practice, especially in agreements between plaintiff lawyers (litigators) and their clients. The majority of the class action lawsuits against the asbestos, pharmaceutical and tobacco industries for environmental damage would have been impossible if lawyers had not had the courage to agree to bring cases to court under the risk of coming away empty handed or even going bankrupt. It can be said that this agreement has forged, and will continue to forge, the legal history of the USA, since it is intrinsic to its legal culture. It is estimated that between 92 and 98% of individual plaintiffs and between 85 and 88% of corporate plaintiffs pay their lawyers on a contingency basis in damage- and contract-related lawsuits[131]. Nevertheless, it still has its critics and there are studies that highlight both its advantages and drawbacks[132].

In Europe, this mechanism for paying lawyers' fees has been strictly prohibited for many years. As a matter of fact, the Code of Ethics of the European Bar Association forbids this agreement in the conviction that «it is contrary to the correct administration of justice because it encourages speculative litigation and is liable to abuse,» but accepts it if no fee is charged in the event of losing the case. Although this has been a general tendency in many European legal systems for quite a time now, it cannot be said that this is the only current one owing to the pressures of market liberalization[133] and the principle of free participation (now applied to the legal practice of lawyers). The different legal systems can be divided into three groups according to the state of their legislation and case law: (a) countries that strictly prohibit the *pactum de quota litis*; (b) countries that allow this agreement partially or totally; and (c) countries that, despite its historical prohibition, have finally changed tack whether by means of a liberating legislative intervention or an interpretation of case law or both.

A prominent member of the first group is Germany, a country that has historically sanctioned this agreement at a case law level, including it among the immoral contracts in § 138 BGB[134],

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speaking countries, but with the qualification that «no legal bond should be created through gaming or betting.» The § 762 (1) BGB establishes the following: «Durch Spiel oder durch Wette wird eine Verbindlichkeit nicht begründet. Das auf Grund des Spieles oder der Wette Geleistete kann nicht deshalb zurückgefordert werden, weil eine Verbindlichkeit nicht bestanden hat.»

[130] S. 335 (1) and (2) Gambling Act 2005. See BEATSON et al., *Anson's Law of Contract*, 30th, p. 411.

[131] EMONS/FLUET, «'Why Plaintiffs' Attorneys Use Contingent and Defense Attorneys Fixed Fee Contracts», *International Review of Law and Economics* 47, 2016, p. 16.

[132] See CABRILLO/ FITZPATRICK, *The Economics of Courts and Litigation*, Edward Elgar, 2008, p. 164.

[133] EMONS and GAROUPA claim that market pressure has led some states (i.e. the United Kingdom, Belgium and Holland) to accept conditional fees (EMONS/GAROUPA, «The Economics of US-style Contingent Fees and UK-style Conditional Fees», *CEPR Discussion Paper*, 4473, 2-3. Available at SSRN: https://ssrn.com/abstract=574542).

[134] Judgment of *Reichsgericht* of 17 December 1926 (RGZ 115, 141, 142), is which it was stated that the *pactum de quota litis* (*Streitanteilsvergütung*) «is a serious offence against the administration of justice and this agreement is contrary to morality»; in more recent times, among others, Judgment of *Bundesgerichtshof* of 13 June 1996

and since 1994 also expressly at a legal level by defining it as a contract contrary to the law[135]. It is also strictly prohibited in the Austrian Civil Code[136] and in France and Portugal by specific laws[137]. Despite being expressly prohibited in other countries (i.e. Belgium, Denmark, and Holland), it can be authorized in exceptional cases.

With regard to the countries in the second group, the *pactum de quota litis* is more widely permitted in the United Kingdom, although its different forms should be differentiated. For affairs in which neither courts nor arbitrators intervene, the agreement in the strict sense of the word (contingent fees: no win no fee) is permitted, while in certain civil litigation categories conditional fees have been allowed since 1995. The main difference between contingent and conditional fees resides in the fact that in the first category clients pay a percentage of the sum in litigation, while in the second they pay an upscale premium unrelated to this sum[138]. In Greece, the *pactum de quota litis* is widely accepted: contingent fees of up to 20% and conditional fees without any restriction[139].

There are other legal systems that, after a long and tortuous journey, have finally accepted this agreement, as is the paradigmatic case of Spain where it was prohibited for years as an immoral agreement by case law[140], before being expressly prohibited once and for all by the Code of Ethics of the Spanish Bar Association[141]. But Spanish case law has finally accepted it, even in the form of contingent fees, considering that the prohibition of the *pactum de quota litis* restricts freedom of price negotiation between client and lawyer in an unjustified fashion and indirectly imposes minimum fees[142]. Consequently, civil case law has modified its formerly negative conception of this agreement which now does not have an «illicit cause» but full civil validity[143]. In the case of Italy, there has been a fair amount of wavering, fraught with quite a bit of uncertainty, since for a time there was some degree of permissibility as regards the *pactum de quota litis*, before returning to square one. The Italian *Codice Civile* still contains the historical rule that prohibits all agreements relating to assets in litigation, but for some years

(BGHZ 133, 90, 93 et seq., in *Neue Juristische Wochenschrift* 1996, 2499, 2500). See SCHEPKE, *Das Erfolgshonorar des Rechtsanwalts: gegenläufige Gesetzgebung in England und Deutschland*, Mohr Siebeck, 1998, p. 110.

[135] § 49 b [2] of the Federal Lawyers' Act (BRAO); on this issue, see KOCHHEIM, Die gewerbliche Prozessfinanzierung: Rechtsfragen der Fremdfinanzierung von Prozessen gegen Erfolgsbeteiligung, Lit, 2003, pp. 147-148.

[136] § 879 (2) ABGB. However, Austrian case law restrictively accepts conditional fees, provided that they do not depend on a percentage of the sum in litigation (SZ 24/93; JBL 1955, 624; ANWBL 1991, 25).

[137] France: *Loi* nº 71-1130, of 31 December 1971, amended by *Loi* n° 2015-990, of 6 August 2015 *(Réforme de certaines professions judiciaires et juridiques*); Portugal: *Lei* 15/2005 (*Estatuto da Ordem dos Advogados*).

[138] EMONS/GAROUPA, *CEPR Discussion Paper*, 2-3, 2004, p. 4473. Available at SSRN: https://ssrn.com/abstract=574542. In this study, the authors show that contingent fees are more efficient than conditional fees because, under the first system, lawyers use the information they have on the sum in litigation, but under the second, they do not behave in this way (3).

[139] EMONS, «Conditional versus contingent fees», *Oxford Economic Papers*, 59, 1, 2007, p. 89.

[140] SSTS, Civil, 12 December 1956 (RJ 1956/3440) and 10 February 1962 (RJ 1962/951).

[141] Art. 16 of the *Código Deontológico de la Abogacía* (plenary session of 30 June 2000).

[142] STS, Contencioso-administrativo, 4 November 2008 (ECLI:ES:TS:2008:6610). This ruling led to the modification of the Code of Ethics of Spanish Bar Association, which currently does not prohibit this agreement, even though the prohibition is still envisaged without any legal effect in Art. 44.3 of the *Estatuto General de la Abogacía* (General Statute of Spanish Lawyers).

[143] SSTS, Civil, 357/2004, 13 May (ECLI:ES:TS:2004:3268) and 446/2008, 29 May (ECLI:ES:TS:2004:3268). See comments by GÓMEZ LIGÜERRE/RUIZ GARCÍA, «Honorarios de abogados, competencia y pacto de quota litis (Comentario a la STS, 3ª, 4.11.2008)», *InDret*, 1, 2009.

this prohibition was gradually qualified, precisely owing to the market pressure to which we have alluded above. Thus, the lawmakers introduced an amendment to the country's civil code in 2006, which protected the legitimacy of the *pactum de quota litis* in rather vague terms[144]. This amendment was then followed by a new draft of the Code of Ethics in 2006 in which the agreement was allowed. Notwithstanding this, the new Forensic Code of Ethics of 2014 had to prohibit it again pursuant to the Legal Profession Act of 2012[145].

In short, on the Old Continent this agreement is politically and legally approached from two conflicting perspectives[146]: the consideration of lawyers as agents of justice who should sacrifice their own interests to protect objective law (classical European-continental system); and the idea that lawyers should use all the legal instruments available in order to obtain the best possible outcome for their clients (Anglo-Saxon system and modern continental model). This last vision, which is more realistic and commensurate with the experience of forensic practice, is rapidly gaining ground.

f. Surrogacy

In Europe, the overwhelming tendency as regards surrogacy is the legal prohibition of any contract, covenant or agreement referring to it and, consequently, the legal treatment that it receives is the sanction of nullity. The traditional vision based on the principles of *quod nullum est nullum efectum producit* and *fraus omnia corrumpit* denies these contracts any type of effect. From this perspective, if the parties successfully complete the process of surrogacy, the parentage of the child or children born as a result is determined with respect to the mother who has given birth, while parental access is denied to the contracting parents (parents of intention), except for the person who has provided the genetic material (biological father) the recognition of whose parentage is admissible. This legal policy has been strictly observed in the majority of countries until only recently. But society itself is clearly encroaching on it since many couples who want to become parents dodge national prohibitions by travelling to those countries where surrogacy is allowed, thus giving rise to a phenomenon that has been called, in a far too general way and not without some contempt, «reproductive tourism». By the same token, increasingly more social groups and even political parties are calling for less restrictive surrogacy laws. With legal policies being questioned and mounting pressure from social groups,

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[144] Art. 1261 of the *Codice Civile* prohibits certain individuals, including lawyers and solicitors, from «transferring rights that are being contested before the legal authorities […] in whose jurisdiction they exercise their functions, under the penalty of nullity and compensation for damages.» The *Legge* No. 248, of 4 August 2006, introduced a new paragraph in Art. 2233 of the *Codice Civile* which established that «agreements concluded by lawyers and licensed solicitors with their clients which establish professional compensations are void, unless they are put down in writing.» On this basis, it is now understood that, from the point of view of private law, the *pactum de quota litis* is valid if it respects the requirement of being a written agreement and can have effects exclusively for the contracting parties, but that they cannot contest third parties, not even in court. For the interpretation by the Italian National Lawyers' Council, CONSIGLIO NAZIONALE FORENSE, *Osservazioni sulla interpretazione e applicazione del d.l. 4 luglio 2006, n. 223, coordinato con la l. di conversione 4 agosto 2006*, n. 248 (Roma, 2016).

[145] Art. 25 (2) of the new Code of Ethics, in literal accordance with Art. 13 (4) of *Legge* No. 247, of 31 December 2012, on the regulation of the forensic profession: «Agreements with which the lawyer receives as compensation, wholly or partly, a share of the goods being supplied or of the object in litigation are prohibited.» See CODICE DEONTOLOGICO FORENSE, *Relazione illustrativa,* 2014, p. 12. Available at http://www.consiglionazionaleforense.it/documents/20182/40227/Relazione+illustrativa+al+Nuovo+Codice+Deontologico+Forense/daff5665-a9df-4693-95f4-b0d1ff32120f.

[146] Cfr. ZWEIGERT/ KÖTZ, *Introduction to Comparative Law*, pp. 84 ss.

evidently this is one of the most controversial socio-juridical topics in recent times[147], to such an extent that the prediction that it would become an issue of international law of our time has been confirmed[148].

In consideration of the continuous stream of new information and the rulings that are being made in this regard in all European jurisdictions, due to the size of this work, only a brief overview of the legal and jurisprudential situation in the main European jurisdictions is given here. The complexity of this subject, as well as its incessant litigiousness, makes it advisable to avoid making a priori or definitive pronouncements[149].

For the time being, Greece and Portugal are the only EU Member States whose legislations recognize the admissibility of surrogacy, although with different effects and scopes. Surrogacy has been regulated in the Greek Civil Code and in Act 3305/2005 on the Enforcement of Medically Assisted Reproduction since 2002: the parents of intention can be a married or unmarried couple or women under 50 years of age, and the embryos created do not necessarily have to have any biological link to the parents of intention; the surrogate mother should obtain court approval of the surrogacy agreement before embryo transfer takes place; the agreement should be of an altruist nature, although the law expressly provides for certain compensations and the payment of €10,000 to the surrogate mother; and since July 2014 non-EU citizens are allowed to enter into surrogacy agreements. The Portuguese Surrogacy Law 25/2016 establishes strict conditions and certain express exclusions: surrogacy requests are restricted to women who lack a womb or whose womb has been damaged by injury or disease, thus preventing pregnancy in an unequivocal and definitive way; it is prohibited in the case of single men or male homosexual couples, but not so in that of lesbian partners, provided that both women have certified their incapability to reproduce; and it is of a fully altruistic nature (neither can the surrogate mother receive any financial remuneration or compensation, nor can she accept any donation from the parents of intention).

In the rest of the European countries outside the EU, the Ukraine is the country that most broadly accepts its validity, even its commercial advertising: since 1997, lucrative (and even commercial) surrogacy agreements are valid in the case of married couples. In the United Kingdom, the Surrogacy Arrangements Act 1985 recognizes the legality of surrogacy, but there are several rules that restrict it (punishable offence to advertise for a surrogate mother; prohibition of lucrative or commercial surrogacy agreements) and surrogacy agreements are only allowed in the case of couples, regardless of their sexual orientation, in which at least one of the partners is a permanent resident in the United Kingdom.

The respective laws of the rest of the European countries prohibit surrogacy. However, the solutions to the domestic effects of surrogacy in a country where it is permitted («international

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147 From a sociological and psychological point of view, see VAN DEN AKKER, *Surrogate Motherhood Families*, Palgrave Macmillan, 2017, p. 39.

148 This prediction was made by STRUYCKEN, «Surrogacy, a New Way to Become a Mother? A New PIL Issue», *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, Eleven International – Schulthess, 2010, pp. 357 ss., and its confirmation was highlighted by ÁLVAREZ GONZÁLEZ, «Gestación por sustitución y orden público», *InDret*, 2, 2017, p. 168. See also DUDEN, *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht*, Mohr Siebeck, 2015.

149 For the perspective of human rights in the respect, see STARK, «Transnational Surrogacy and International Human Rights Law», *ILSA. Journal of International & Comparative Law*, 18, 2012, p. 369.

surrogacy»), provided for in different European legislations, above all as regards the problem of recognizing the link between the surrogate children and the parents of intention, are far from being homogeneous. Concerning this issue, one of the main problems that must be elucidated is to discern the content of public policy. In recent times, the recognition of parentage established by law or by the authorities of a foreign country where surrogacy is allowed has, in some cases, been denied in another in which it is prohibited by some of its authorities. In these cases, it is frequently argued that public policy, alone or accompanied by other arguments (e.g. legal fraud), is an obstacle to the recognition of parentage. In this regard, the judgements of the European Court of Human Rights (ECHR) of 26 May 2014 (cases *Mennesson* and *Labassée*)[150] marked a «before and after» [151] and are essential in the definition of public policy in European legal practice. In these ruling, the ECHR considered that recourse to French public policy as an obstacle to the recognition of the parentage of children born using gestational surrogacy was not justified for infringing Article 8 ECHR, in the sense that it affects the right of children to «private life». For a correct assessment of these judgments, it is essential to bear in mind two elements: on the one hand, the fact that in both cases there was a biological link between the children and one of the parents of intention; and, on the other, that the refusal of the French courts was based on a paroxysm in the strict application of the principle of *faus omnia corrumpit*, so the recognition of any effect to the fraudulent act was not only prevented, but also other effects could not be recognized by any other instruments provided by the system itself, like for example adoption. The judgment of 16 July of the ECHR[152] broadly corroborates this doctrine and the Advisory Opinion of 10 April 2019[153]. This is a case in which the French authorities refused to recognise the parentage between the child born through surrogacy and the intended mother who provided genetic material, both spouses being recorded in the foreign birth certificate as the legal father and mother. The judgment rejected the violation of Articles 8 and 14 of the Convention, but reaffirmed the idea that there may be such a violation if in the specific case there is a prolonged situation of non-recognition of a link (e.g. adoption) between the child and her intended mother.

Not all European legal systems have reacted in a like manner to the *Mennesson* and *Labassée* judgments, and these reactions can be grouped, among others, into two opposing tendencies in which the arguments used and the factors chosen are not always identical. On the one hand, there are those countries that recognize the parentage of children born using gestational surrogacy, despite their domestic legal prohibitions, by neutralizing the argument of public policy. On the other, there are other countries that still maintain public policy as a monolithic and insurmountable concept.

France has opted for the first approach with two rulings of the *Cour de cassation* of 3 July 2015[154] in which it was more than laconically declared that the surrogacy contract in question

[150] Mennesson v France (65192/11) and Labassée v France (65941/11).

[151] ÁLVAREZ GONZÁLEZ, *InDret* 2, 2017, pp. 165 ss.

[152] For a comprehensive analysis, see ÁLVAREZ GONZÁLEZ, «Una nueva entrega sobre la gestación por sustitución en el Tribunal Europeo de Derechos Humanos y el ejemplo de la jurisprudencia francesa», *Revista de Derecho Civil,* VIII, 2, 2021, pp. 193-219.

[153] The opinion determines that the lack of recognition of the filiation link between surrogacy children and the intended mother with whom there is no genetic link and who appears as the legal mother in the foreign documentation is contrary to the Convention.

[154] Judgments of the *Cour de cassation* no. 619 (14-21.323) and 620 (15-50.002) of 3 July 2015, Available at https://www.courdecassation.fr/jurisprudence_2/assemble_pleniere_22/620_3_32232.html, overcoming previous

did not constitute «any obstacle to the registering of the birth certificate». Subsequently, in three judgments of 18 December 2019[155], the Court of Cassation opens the way directly to the full transcription of foreign birth certificates in cases where the lower courts have opted for partial transcription in respect of one of the intended parents for whom the initiation of adoption proceedings would be impossible or unsuitable for the situation. This was also the approach taken by the Italian *Corte di Cassazione* in its judgment of 26 September 2016[156], amending the earlier judgment of 26 September 2014[157]. The stance of the German *Bundesgerichtshof* (BGH), which is taken as a model for the Italian appeal court, is especially important in this approach. The ruling of 10 December 2014 of the BGH[158], which, with a plethora of arguments, resolved a Californian judgment establishing the parentage of the surrogate child of a registered partnership formed by two male Germans, considered that a foreign legal decision containing a declaration of parentage could be domestically recognized on the basis of the guarantees of the European Convention on Human Rights, and that the fact that a foreign judgment attributed the parentage of the child to the parents of intention in the case of surrogate motherhood «does not imply any infringement of public policy when one of the parents of intention—unlike the pregnant mother—is genetically linked to the child.»

The second approach is taken by the Spanish *Tribunal Supremo*, which insists on maintaining the criteria followed by the judgement of 6 February 2014 (ECLI:ES:TS:2014:247)[159] which confirmed that the registration of the birth certificates of surrogate children born in California in the Spanish Civil Registry by a Spanish male couple was contrary to Spanish public policy. The High Court restricts the concept of Spanish public policy to the prohibition of surrogate motherhood provided for in the Act on assisted reproduction techniques. In its Order of 2 February 2015 (ECLI:ES:TS:2015:335A), the High Court understood that the criteria deriving from the rulings of the European Court of Human Rights (*Mennesson* and *Labassée*) did not affect the conception of Spanish public policy. The stance taken by the Swiss Federal Court (*Bundesgericht*) also dovetails with this tendency. In its ruling of 21 May 2015[160], the court revoked the judgment at first instance which had accepted the registration of the birth certificate of a surrogate child born in California in the Swiss Civil Registry by a registered partnership formed by two Swiss men, one of whom had provided genetic material. The Federal Court established that only the parentage of the biological father should be recognized, and not that of the father of intention, on the basis of the constitutional prohibition of surrogacy (Art. 119.2.d of the Swiss Constitution, which determines the content of its public policy).

Judgments of 6 April 2011 (nos. 369, 370 and 371), 13 September 2013 (nos. 12-18315 and 12-30138), and 19 March 2014 (no. 13-50.005)

[155] *Cour de cassation* No. 1111 18.12.2019 (18-11815) - *Cour de cassation* - Première chambre civile (ECLI:FR:CCASS:2019:C101111); *Cour de cassation* No. 1112 18.12.2019 (18-12327) - *Cour de cassation* - Première chambre civile (ECLI:FR:CCASS:2019:C101112); *Cour de cassation* No. 1113 18.12.2019 (18-14.751; 18-50007) - *Cour de cassation* - Première chambre civile (ECLI:FR:CCASS:2019:C101113).

[156] *Prima sez. civ., sentenza n. 19599*, available at http://www.cortedicassazione.it/corte-di-cassazione/it/prima_sezione.page.

[157] Rivista di diritto internazionale privato e processuale, 2015, pp. 428 ss.

[158] XII ZB 463/13 Available at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2014&Sort=3&nr=69759&linked=bes&Blank=1&file=dokument.pdf.

[159] See note by ÁLVAREZ GONZÁLEZ, «Nota a la STS 6 febrero 2014», *Revista Española de Derecho Internacional*, 2, 2014, pp. 272 ss.

[160] 5A_748/2014 Available at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm.

In short, the issue of surrogacy is still open and new judicial pronouncements are expected, and it is even possible that some other countries will also join the club of permissive legislations. Essentially, European approaches in this regard can be summarized in four political-legal models: (1) those countries that have permissive laws in which lucrative contracts (utilitarian stance) are allowed, as in the case of the Ukraine; (2) those with conditioned permissive laws that prohibit lucrative agreements in all cases and which are characterized by the legal policy of promoting reproductive rights, but under more of less strict conditions, as in the case of the United Kingdom, Greece and Portugal; (3) those countries with absolute legal prohibitions in which public policy overrules any recognition of foreign judgments or orders pertaining to parentage (e.g. Spain and Switzerland), and where public policy is—so to speak—»static»; and (4) countries with legal prohibitions that are relatively implemented and in which the concept of public policy is restricted to constitutional provisions (constitution and human rights treaties), which allows certain cases in which parentage should be recognized to be adapted to reality, thus public policy can be said to be «dynamic» (France, Italy and Germany). Given the current lack of consensus on the second model described above and in the face of a legal reality that mostly prohibits surrogacy, the implementation of the fourth model is defended here as it broadly respects the various interests (reproductive rights of the intended parents, *favor filii* and interests of surrogate children) and the content of the human rights at stake (above all, the respect for «private life»).

In any case, generally speaking, it is wrong to link the content of public policy exclusively to a legal prohibition, for they are two different realities. This vision would be very glib. In the light of what has been studied under the topic «contracts contrary to fundamental principles», it can be stated that something more is needed than a mere legal prohibition to reach the conclusion that a contract is contrary to public policy, which should necessarily be determined by higher principles and values that can be specifically (rather than abstractly) drawn from the highest rules of the legal system (constitution and human rights treaties).

4. Effects

Declaring a contract contrary to the principles regarded as fundamental in the legal systems of the EU Member States or, as the case may be, contrary to the regulatory provisions of mandatory law, gives rise to a number of very important effects for the contractual relationship concluded between the parties. In the first instance, practically all legal systems consider illegal contracts void—in whole or in part—and acknowledge in some way that the parties are bound to make mutual restitution of the fruits and interests of performance[161]. Moreover, some systems envisage action for damages stemming from a declaration of nullity of contract[162].

The aim of both the PECL and the DCFR is to compile the essential elements of European private law and group the effects into four different concepts:

[161] In any case, this has been one of the most controversial issues in the field of illegal contracts, to the extent that the application of the *nemo auditur propiam* rule, originating from Roman law, would impede restitution, as will be seen further on.

[162] Art. 6:162 BW.

A. Ineffectiveness of a contract: nullity (Arts. 15:101 PECL and II. – 7:301(b) DCFR), partial ineffectiveness (Arts. 15:103 PECL) and a flexible regime in the case of contracts contrary to a mandatory rule of law (Arts. 15:102 PECL and II. – 7:302 DCFR).

B. Duty of restitution of whatever has been supplied under the contract (Art. 15:104 PECL and II. – 7:303(1) DCFR).

C. Effect of the transfer of property (Art. II. – 7:303(2) DCFR).

D. Damages for loss (Arts. 15:105 PECL and II. – 7:304 DCFR).

While it may appear that the regime of effects is, as mentioned above, fairly comprehensive and exhaustive, the absence of a precept that regulates «conversion» has been alleged, insofar as this concept appears in the most technical European civil codes[163].

5. Ineffectiveness of an illegal contract

5.1. Nullity of contracts contrary to fundamental principles: ineffectiveness or nullity?

One of the most important issues relating to the regime of illegal contracts resides in determining the consequences of a contract that is contrary to the fundamental principles of EU law. And, on this point, a difference of approach is detected in the PECL and the DCFR, since while the former declares a contract ineffective, the latter understands that it is rendered completely void. We will now take a separate look at both of these effects.

According to Article 15:101 PECL, the contract «is of no effect», hence it is to be understood that it lacks effectiveness or, as VAN SCHAICK notes, is completely ignored *ex lege*[164]. From the official comments to Article 15:101 PECL it can be deduced that ineffectiveness implies the non-enforcement of a contract, namely, the impossibility of demanding the performance or enforcement of a contract contrary to fundamental principles[165].

Therefore, it is evident that the PECL have resorted to the concept of «ineffectiveness»[166], a doubtless broad and, to a certain extent, more indeterminate term than others such as nullity or avoidance[167]. This option, from our point of view, reflects an Anglo-Saxon influence, inasmuch as they avoid the term «nullity» (both complex and debatable in English law) and refer instead to the generic concept of ineffectiveness or non-performance of contracts contrary to fundamental principles. That said, it should be noted that in the drafting of the English version of Article 15:101 PECL the expression, «A contract is of no effect to the extent

[163] § 140 BGB (*Umdeutung*), Art. 1424 of the Italian CC (*conversione del contratto nullo*) or Art. 293 of the Portuguese CC (*conversão*). See VAN SCHAICK, «Chapter 15. Illegality», in BUSCH et al. (eds.), *The Principles of European Contract Law (Part III) and Dutch Law*, Kluwer Law International, 2006, p. 243.

[164] VAN SCHAICK, The Principles of European Contract Law (Part III) and Dutch Law, p. 245.

[165] LANDO/BEALE, Principles of European Contract Law, Part I, p. 212.

[166] «The Principles here avoid the national concepts of nullity (absolute or relative), voidness, voidability and unenforceability, and use instead the concept of *ineffectiveness*», LANDO/BEALE, *Principles of European Contract Law*, p. 212. In the same vein, KÖTZ, *The Max Planck Encyclopedia of European Law*, p. 849.

[167] See DELGADO ECHEVERRÍA/PARRA LUCÁN, *Las nulidades de los contratos*, Dykinson, 2005; DE CASTRO Y BRAVO, *El negocio Jurídico*, 1985, p. 462.

that it is contrary to the principles....» is employed, deliberately, in our opinion. Why was not the conditional «if» used, instead of the phrase «to the extent that» (equivalent to the expression «insofar as»)? Although no explanation is given in the comments as to why this wording was used, the difference between them is no trivial matter.

According to MACQUEEN, a contract «in restraint of trade» (and therefore *ab initio* ineffective for infringing the fundamental principle of freedom of market) could be effective provided that the restraint of trade that it suggests does not lead to undue restrictions on the freedom of the contracting party or his or her competitors[168]. So, it would seem that the criterion that should be taken into account is that of verifying the effective infringement of fundamental principles in each specific case. For his part, VAN SCHAICK believes that what the expression «to the extent that» employed in Article 15:101 PECL actually does is to introduce the possibility of a kind of «partial ineffectiveness»[169]. To wit, the principles would leave open the possibility that the uncontaminated part of the contract might be fully effective.

Of course, any one of these two stances is eligible, though the analogical solution of partial ineffectiveness is more convincing. Firstly, because it is coherent with the text of the precept, insofar as we understand that Article 15:101 PECL simply grants the possibility that the part of the contract that (to the extent that it) does not oppose fundamental principles may remain valid. Furthermore, Article 15:103 PECL states, «If only part of a contract is rendered ineffective under Article 15:101 or 15:102, the remaining part continues in effect, unless, giving due consideration to all the circumstances of the case, it is unreasonable to uphold it.» Namely, the very principles consider the possibility that a contract contrary to fundamental principles can be ineffective in part, whereby a systematic and harmonious interpretation of both precepts leads to the solution of «partial effectiveness». In addition, this solution is no stranger to European comparative law[170]. Lastly, MACQUEEN's interpretation does not make much of a contribution, since before declaring a contract ineffective, any court would check if a real and effective infringement of fundamental principles has actually existed, beyond the appearance of the contractual agreement. Be that as it may, criticism should be levelled at the drafters of the PECL for leaving open such an important question as that of the specific regime of ineffectiveness of contracts contrary to fundamental rights.

The approach of Article II. – 7:301 DCFR, as has already been underscored, is plainly different, inasmuch as it regards contracts contrary to fundamental principles recognized in the legal systems of the EU Member States as void. In the words of the commentators of the text, «a contract which infringes fundamental principles, and the nullity of which is required by the Article, is void from the beginning and not merely voidable by a party or by a court»[171]. In our opinion, this solution seems much more correct for it avoids the interpretative problems arising from the term «ineffectiveness», resorting instead to a traditional and practically globally accepted notion in this field as that of «nullity». It should not be forgotten that most of the European legal systems regard a contract contrary to morality or good morals or public

[168] MACQUEEN, Towards a European Civil Code, p. 555.

[169] VAN SCHAICK, The Principles of European Contract Law (Part III) and Dutch Law, p. 245.

[170] *Teilweise Nichtigkeit* (§ 139 BGB), severance (English law). INFANTE RUIZ/OLIVA BLÁZQUEZ, *InDret*, 3, 2009, p. 25.

[171] VON BAR/CLIVE (eds.), Principles, Definitions and Model Rules of European Private Law, vol. I, p. 537.

policy as *ipso jure* void, hence it seems the correct solution in principle (common core approach)[172].

Moreover, the article in question goes on to state that «a contract is void to the extent that nullity is required to give effect to that principle.» It would appear that the drafters of the project, aware of the interpretive problems stemming from Article 15:101 PECL, as has just been seen, sought to clarify that the radical and total invalidity of a contract only occurs when this is essential to protecting the applicability of the principle whose infringement is intended with its conclusion. Otherwise, we understand that, *contrario sensu*, ineffectiveness will be partial, exclusively affecting those terms that are contrary to fundamental principles, the remaining part continuing in effect if it can reasonably be maintained without the invalid or ineffective part. Again, however, it would have been nice for this issue to have been clarified, instead of leaving it to the interpreter to decide.

5.2. Contracts contrary to a mandatory rule

a. Flexibility of the system: diversity of possible effects

Broadly speaking, the PECL-DCFR duet is characterized by enshrining a *flexible and discretionary system* for the judicial treatment of illegal contracts. Articles 15:102 PECL and II. – 7:302 DCFR both grant judges ample discretionary powers to determine the effects of contracts contrary to a mandatory or prohibitive rule. They can declare them valid or void in whole or in part with retroactive effect, or modify them and their effects, thus having a wide range of possible effects at their disposal.

The main aim of Article II. – 7:302 DCFR is the regulation of the effects of an infringement of a mandatory or prohibitive rule. For this purpose, the provisions of the infringed rule must first be taken into account. Thus, if it provides for a particular effect, this must be pursued. When the infringed rule does not establish what the sanction should be for its contravention, then the second paragraph should be applied, which grants judges ample discretionary powers to declare a contract valid, invalidate it with retroactive effect or in part, or even modify its effects[173]. This last alternative that grants them the power to modify the contract is doubtless one of most important new developments of this regulation which is absent from the majority of European legal systems. The range of possibilities for judicially modifying a contract is fairly broad, so its appraisal is left to the case in question. However, it is important to highlight a demand that appears in the official comments: the decision of the judge must be an «appropriate» and «proportionate» response to the infringement, bearing in mind all the relevant circumstances and, in particular, those mentioned in Paragraph 3 of this same article[174].

[172] In the Spanish Civil Code, the general consequence arising from the illegality of cause, which embraces both illegal and immoral contracts, is *ipso jure* or absolute nullity (Arts. 6.3, 1255, and 1275 CC), since what is involved is an invalidity of public interest, rather than individual protection. Likewise, French case law has had no hesitation in describing the ineffectiveness arising from contractual illegality as «nullité radicale» or «nullité absolue», INFANTE RUIZ/OLIVA BLÁZQUEZ, *InDret*, 3, 2009, pp. 6 and 21.

[173] VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law*, vol. 1, Art. II. – 7:302, Comment D, p. 541.

[174] INFANTE RUIZ/OLIVA BLÁZQUEZ, *InDret*, 3, 2009, p. 6 and 21.

According to MCQUEEN (dealing with Chapter 15 of the PECL but the explanation is also valid for the DCFR), this approach to the matter led to a certain amount of controversy in the Lando Commission, to the extent that it seemed to vest the PECL with the power to override applicable positive law, and courts with excessive discretionary powers. These doubts were dispelled when, in 1999, the Law Commission of England and Wales issued a recommendation on the effects of illegality in contracts and trusts[175]. In this connection, it concluded that the judge had to be given ample leeway to decide whether or not illegality should serve as an exception should performance be required, taking into account a number of factors such as the seriousness of the illegality and the awareness or intention of the party requesting contractual performance, in addition to whether or not the rejection of the claim acts as a deterrent, facilitates the purpose of the rule or is proportionate to the infringement[176].

This flexibility, which can also undoubtedly be achieved by means of the general provisions established in European civil codes[177], is not a new reality in the history of law[178]. As a matter of fact, some systems have achieved this by means of case law interpretation[179]. It was already enshrined in Roman law where laws were classified in view of the sanction that they carried, namely: (a) *leges minus quam perfectae* which began to proliferate around the mid-second century BC and which envisaged a pecuniary sanction for non-performance, although not the nullity of the act; (b) *leges imperfectae*, already present in the origins of Roman law, which had different juridical-political motives, but did not carry any sanction (*quieta non movere*); and (c) *leges perfectae*, appearing in the late Republic, whose infringement led to the nullity of the act. This can be clearly observed in British common law in which a profusion of scenarios with different effects can be discerned on the topic of statutory illegality[180].

Insofar as the notion of a flexible system designed in the PECL and the DCFR is drawn to our mind from the common law tradition when addressing different cases, it should be highlighted that statutory illegality embraces a variety of cases in which the sanction of nullity is not always the applicable consequence. In short, the following can be highlighted: (a) express

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[175] LAW COMMISSION OF ENGLAND AND WALES, *Consultation Paper No. 154, Illegal transactions: the effect of illegality on contracts and trusts* (1999), Available at www.lawcommission.gsi.gov.uk. For a detailed comment, see SPTL SOCIETY OF LEGAL SCHOLARS, *The Law Commission, commercial and common law team, Illegality in Contract*, 2002, Available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Illegal_Transactions_Paper_Sept2002.pdf.

[176] MACQUEEN, in in La Tercera Parte de los Principios de Derecho Contractual Europeo, p. 558.

[177] Art. 1131 of the French CC, Art. 6.3 of the Spanish CC, § 134 BGB, Art. 3:40 NBW.

[178] Expressively put by ZIMMERMANN, *The Law of Obligations*, p. 701: «[O]nly comparatively recently has there been a return to a greater degree of flexibility.»

[179] This is the case of Spanish law. Art. 6.3 of the Civil Code establishes the following: «Acts contrary to mandatory and prohibitive rules shall be null and void by operation of law, save where such rules should provide for a different effect in the event of violation.» The interpretation of Art. 6.3 of the Spanish Civil Code by Spanish case law coincides in part with this approach. Since the STS of 27 February 1964 (mortgage established against certain rules governing banking practice), plainly corroborated in the STS of 18 June 2002 (agreement of a cooperative adopted in an irregular fashion), notwithstanding the fact that the general consequence envisaged for illegal acts and contracts is radical ineffectiveness, there are different levels of effectiveness: (a) the invalidity of the acts as provided for by law; (b) the effectiveness of acts contrary to the law, but whose legal effect is provided for; and (c) a flexible set of effects to be assessed by the court with regard to those acts whose sanction has not been provided for by law. For further details, see INFANTE RUIZ/OLIVA BLÁZQUEZ, *InDret*, 3, 2009, pp. 24 ss.

[180] See BEATSON et al., *Anson's Law of Contract*, 30th, pp. 410 ss. In New Zealand and Israel, despite the fact that their respective legislations declare that illegal contracts are void, in legal practice, however, judges are given ample discretion that authorizes them to enable the performance of a contract (SCHWENZER et al., *Global Sales and Contract Law*, pp. 247 ss.).

prohibition in those cases in which there is no doubt as to the intention of the lawmakers that such a contract can be performed pursuant to the rule «what is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action»[181]; (b) implied prohibition in which case it is up to the courts to decide whether the legal terms pertaining to the purpose of the law only prohibit and penalize the proscribed conduct or whether they also prohibit the contract, which often occurs when the purpose of the law is the protection of public policy from injury or fraud[182]; (c) illegal performance in which the law is contravened during the performance of a contract that is not illegal per se, in which case the guilty party is not entitled to lodge any complaint based on his or her own illegal conduct, yet the innocent party may indeed bring proceedings against the guilty party, bearing in mind that the contract was initially legal, despite having been performed illegally[183]; (d) statute only imposes a penalty in which case the sanction does not necessarily render the contract devoid of effects, yet the courts should take into consideration the legal language and the goal and purpose of the law to determine whether the law intends to prevent the party committing an illegality from taking legal action, or whether it simply intends to impose a penalty on the offender; case law declares that when the purpose of the law is simply to impose a penalty, even the guilty party can file a claim[184]; (e) void contracts in which the law declares them, or a specific term, void, which means nullity and prescribes the consequences of a contract or term declared void; in these cases, the contracting parties cannot perform it legally, although they are entitled to recover the sum or property transferred under the contract, provided that this is not expressly prohibited by the law or by the legal interpretation[185]; (f) contracts unenforceable by one party which are characterized by the fact that the statute, or their very construction, expressly establishes that they are not performable by the party who is legally obliged to observe a duty, in which event their performance cannot be demanded by this party, but indeed by the other[186]; and (g) contracts not void or unenforceable, a category that refers to those cases in which a contract is not directly contrary to a legal provision, or the law expressly declares that the contravention of its prohibition determines neither its nullity nor its ineffectiveness, in which event the court may accept its performance, but also reject it if it believes that this could contribute to the commission of an illegal act or be associated with some or other illegal purpose[187].

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[181] *Langton v Hughes* (1813) 1 M & S593, 596 (Lord Ellenborough CJ). This is also true of the famous case *Re Mahmoud and Ispahani* ([1921] 2 KB 716) in which an individual sold oil to a third party who did not have a license, contrary to a statutory order at times of war prohibiting the purchase and sale of linseed oil without a license from the Food Controller. The appeal court rejected the seller's claim, even though he was unaware that the purchaser did not have a license.

[182] Anderson v Daniel (1924) 1 KB138.

[183] Marles v Philip Trant & Sons Ltd. (1954) 1 QB 29; Ashmore, Benson, Pease & Co. Ltd. v AV Dawson Ltd. (1973) 1 WLR 828.

[184] St John Shipping Corporation v Joseph Rank Ltd. (1957) 1 QB 267.

[185] Gaming Act 1845, s 18; Marine Insurance Act 1906, s 4(1); Equality Act 2010, ss 142 et seq.; Bills of Sale Act 1878, s 8; Companies Act 2006, s 859(H); *North Central Wagon Finance Co. Ltd. v Brailsford* [1962] 1 WLR 1288 (bill of sale); *Harse v Pearl Life Assurance Co.* [1904] 1 KB 558 (*recovery of money*).

[186] Consumer Credit Act 1974, ss 5 (amended by SI 2010 No. 1010); Equality Act 2010, s 144; Financial Services and Market Act 2000, ss 26, 27 (amended by Financial Services Act 2012); *Group Josi Re v Walbrook Insurance Co. Ltd. and others* [1996] 1 WLR 1152.

[187] Trade Description Act 1968, s 35; Business Protection from Misleading Marketing Regulations 2008 (SI 2008 No. 1276); Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No. 1277); *Chase Manhattan Equities Ltd. v Goodman* [1991] BCLC 897, pp. 931-934.

b. Relevant criteria

In Paragraph 3, Article II. – 7:302 DCFR, mention is made of a series of «relevant circumstances» that may be taken into account to determine the effects of an illegal contract. This list is neither closed nor exhaustive and, as a result, the court may discern other circumstances[188], the criteria employed even overlapping[189]. The circumstances or factors listed in these precepts are as follows[190]: (1) the purpose of the rule that has been infringed, whereby the judge must interpret its meaning and purpose in accordance with the usual hermeneutic rules; (2) the category of persons for whose protection the rule exists, which is closely related to the previous factor. In this regard, if the rule prohibits only one of the parties from concluding the contract, this does not mean to say that the other party can use the illegality as a lever to prevent its effects. In our opinion, this rule leads to the traditional estoppel doctrine which can be invoked by the innocent contracting party (or as the basis of the claim), versus the claim of the other party who, despite being aware of the illegality, has concluded the contract; (3) the existence of other sanctions, for when the rule in question itself envisages a criminal or administrative sanction against the infringer, on many occasions its imposition is usually sufficient, without the additional need to establish the ineffectiveness of the contract; (4) the seriousness of the infringement, so if this is minor, the court may declare the effectiveness of the contract; (5) the intentionality of the infringement which legitimizes the court's decision to take into account the parties' awareness of or innocence in the infringement of the rule; and (6) the relationship between the infringement and the contract: this factor requires assessing whether or not the contract has been stipulated, expressly or implicitly, for an illegal performance by one or both parties.

The influence of the factors listed by the Law Commission of England and Wales[191] on the formulation of these precepts is more than evident[192]. Nevertheless, this does not mean to say that there is a lack of flexibility when assessing the effectiveness of an illegal contract. The case law of most European countries establishes this influence on the basis of factors very similar to those discussed above[193].

None of these factors ranks over the rest, except for the need for a teleological interpretation of the infringed rule. It is only thanks to the (teleological) interpretation of its meaning and purpose, to which the rest of the indicated circumstances and any others relevant to the case which may confront the rule undoubtedly contribute, that the court can establish the object of the rule and, consequently, the most suitable remedy to achieve this.

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[188] LANDO et al., Principles of European Contract Law, Part III, p. 216.

[189] VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law,* vol. 1, Art. II.-7:302, Comment F, p. 541.

[190] For the comments to these precepts, see MACQUEEN, in *La Tercera Parte de los Principios de Derecho Contractual Europeo*, pp. 558 ss.; LANDO et al., *Principles of European Contract Law,* Part III, pp. 216 ss.

[191] UK THE LAW COMMISSION, *The illegality defence,* Consultation Paper 28-2.79, 2.80, 189, 2009.

[192] Cfr. MACQUEEN, in *La Tercera Parte de los Principios de Derecho Contractual Europeo*, who points out that it is an apparent influence.

[193] Take, for example, Spanish case law. The interpretation of the High Court, on the strength of its STS, Civil, 27 February 1964 (RJ 1964/1152), is very similar to that of the PECL and the DCFR since it applies Art. 6.3 CC. The set of factors (all those relevant to the case) to be considered by the court, such as the purpose of the rule, the category of persons whose protection exists, any other sanction that could be imposed for the infringement, etc., is also present in Spanish case law; the only formal, though not substantial, difference is that these factors are more plentiful and detailed in the PECL and the DCFR.

A teleological interpretation of the infringed rule would make it possible to clarify whether it establishes a prohibition or a mandate and whether it envisages the nullity of the contract as a sanction or allows for a certain degree of effectiveness. Literal legal interpretations do not serve as a general rule if these are not supported by other elements that distinguish its mandatory or prohibitive nature. The expressions «it cannot» or «it is not permissible» are usually understood as signs of a prohibitive rule, whereas «it should not» is perceived as a caution that prohibition does not exist. However, a mere appraisal of the legal diction is rather unhelpful, for the expression «it cannot» does not always signify prohibition, but can also be taken as a caution as regards the limits of the possibility of provision. Similarly, the expressions «should» or «must» normally reveal a mandatory rule, but in many cases can also entail mere «advice» or legal warnings.

Although a pecking order of criteria does not exist, in our view the importance of another two criteria should also be underscored. On the one hand, the scope of protection of the rule, a criterion that enables the establishment of a circle of protected subjects and, above all, the interests that are being protected. Evidently, in the case of subjects who find themselves in an unfavorable situation or when the interests are of a general nature, nullity can be an appropriate remedy. On a separate issue, a mandatory or prohibitive rule may involve only one of the contracting parties; it does not necessarily have to entail both. When the prohibition does involve both, consequently the infringement usually leads to the nullity of the contract, and in those cases in which the law requires an administrative authorization for one of the parties the rule of thumb is normally to allow the effectiveness of the contract, without prejudice to the corresponding administrative sanction[194].

Moreover, it is also a fairly useful assessment tool for reflecting on the purpose pursued by the contracting parties with the infringement. The relevance of this criterion lies in the fact that when both contracting parties harbor fraudulent intentions, it can be presumed that the most adequate sanction is nullity. When only one of the parties harbors these intentions and the other is unaware of the infringement, this circumstance can be assessed along with the rest of the criteria, especially that of the scope of protection. There are authors who have also rightly indicated that the invalidation of a contract could harm the innocent party[195]. Here, there is no special trend towards the declaration of nullity. Thus, for instance, if nullity is the best remedy to protect the innocent party, this eventuality should be taken into account, though this will not always be the case.

5.3. Ineffectiveness of a illegal contract and right of ownership

The declaration of nullity or ineffectiveness of illegal contracts begs the following question: how does the said nullity or ineffectiveness affect the ownership of goods or services constituting the object of an illegal contractual agreement? In European comparative private law two different solutions to this complex issue can be observed:

A. The nullity of the contract impedes conveyance of ownership. In French civil law, it is considered that the ownership cannot be transferred under an illegal contract, all of which is

[194] Cfr. KÖTZ/PATTI, Diritto europeo dei contratti, p. 286.

[195] SCHWENZER et al., *Global Sales and Contract Law*, p. 251.

perfectly logical if one bears in mind that contracts of this kind are radically void, non-existent and that nothing can be transferred by nothing (*ex nihil fit*)[196]. The retroactivity that is recognized for the purpose of nullity impedes the conveyance of ownership, each contracting party being obliged to restore whatever they have received under the agreement. Likewise, in the Spanish legal system, based on the rule of «agreement and delivery» (*título y modo*), a void contract is considered of no effect (*quod nullum est nullum producit effectum*)[197], whereby ownership cannot have been validly conveyed. Nonetheless, it is important not to forget that the *nemo auditur* rule can, in both legal systems, consolidate a sort of *ex lege* conveyance of ownership indirectly by rejecting to take actions of restitution. This issue has been the object of study in Spanish legal doctrine, which seems to prefer the option of understanding that, in such cases, only the conveyance of the possession takes place, since a radically void contract cannot under any circumstances constitute a title suitable for the conveyance of ownership[198].

B. Nullity does not impede conveyance of ownership. In Germany, as is known, the principle of abstraction applies and ownership is transferred with consent and delivery, there being no need for a «cause». For this reason, although the contract is in principle illegal conveyance of ownership takes place. In English law, property can also be conveyed by means of an illegal contract[199].

Unlike the DCFR, which in Article II. – 7:303 states that «the effect of nullity or avoidance under this Section on the ownership of property which has been transferred under the void or avoided contract, or part of a contract, is governed by the rules on the transfer of property,» the PECL eschews this matter, surely due to its intrinsic complexity[200]. So, the solution is deferred to whatever the rules on conveyance of ownership expressly provide for, which in this case establish the following: firstly, the rule of thumb is that if the contract is *ab initio* void, ownership is not transferred (Art. VIII. – 2:202)[201]; and, secondly, when the contract is avoided as illegal, once ownership has been transferred, the said nullity has retroactive effects and, as a consequence, it is understood that the transfer has never taken place (Art. VIII. – 2:202, 2)[202].

The combined interpretation of the aforementioned rules allows to conclude that, according to the DCFR, ownership has not effectively been transferred at any moment. As the comment to Article II. – 7:303 DCFR points out, the effects of nullity or avoidance on the rights of ownership is retroactive, therefore the assets will continue to belong to the same party as before their conveyance by virtue of the void or avoided contract. The solution may seem

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[196] TERRE et al., *Droit Civil. Les obligations,* 7th ed., Dalloz, 2015, p. 387.

[197] On commenting on Art. 1190 of the Project of 1851, GARCÍA GOYENA stated «a contract declared void has not existed civilly, and nullity cannot, generally speaking, produce any effect.» (GARCÍA GOYENA, *Concordancias, motivos y comentarios del Código Civil español*, Cátedra de Derecho Civil de la Universidad de Zaragoza, 1974).

[198] See SABORIDO SÁNCHEZ, *La causa ilícita: delimitación y efectos*, Tirant lo Blanch, 2005, p. 398.

[199] In the case of *Tinsley v Milligan*, the court considered that right of ownership acquired under an illegal contract could and should be enforced, [(1994) 1 A.C. 340]. See ENONCHONG, «Effects of Illegality: A Comparative Study in French and English Law», *The International and Comparative Law Quarterly*, 44, 1, 1995, p. 200.

[200] «Similarly, the Principles contain no provisions about the transfer of property and ownership under illegal transactions,» LANDO et al., *Principles of European Contract Law*, p. 224.

[201] «Where the underlying contract or other juridical act is invalid from the beginning, a transfer of ownership does not take place.»

[202] «Where, after ownership has been transferred, the underlying contract or other juridical act is avoided under Book II, Chapter 7, ownership is treated as never having passed to the transferee (retroactive proprietary effect).»

totally logical for jurists specializing in continental Roman law, but not so for those influenced by Germanic or common law. This is likely to be one of those issues where it will be very difficult to reach a consensual solution, so it can be expected that the proposed rule will not be well received in some EU countries.

5.4. Partial ineffectiveness

Article 15:103 PECL addresses the rule of partial ineffectiveness that is present in the majority of European legal systems in accordance with the principle of severability. For its part, Article II. – 7:302 DCFR(2)(b) also alludes to partial nullity as a degree of ineffectiveness that can be decreed by the judge when the infringed rule does not expressly envisage the effects in the event of an infringement. Furthermore, this last precept takes on its full meaning in relation to Article II. – 1:108 DCFR, which regulates partial ineffectiveness.

Most European legal systems feature precepts pertaining to partial ineffectiveness[203] or widely acknowledge their application in case law, as in the case of England[204] and Spain[205].

The basic idea is to minimize the impact of illegality or immorality, to which purpose if the contract is illegal only in part, the rest remains valid, unless this is deemed unreasonable after taking all the circumstances of the case into consideration[206]. The same rule applies to the convenient adaptations with respect to restitution (Art. 15:104 PECL) and damages (Art. 15:105 PECL). According to the comments, the circumstances that can be taken into account include considering whether or not the contract has an independent life without the invalid part, whether or not the parties would have wanted a contract only with the valid part[207], and

[203] § 139 BGB, Art. 20 (2) OR (Swiss Code of Obligations), Art. 3:41 NBW (*gedeeltelijke nietigheid*), Art. 1419 of the Italian CC (*nullità parziale*), Art. 1217 and 1218 of the Portuguese CC (*redução*), and Art. 181 of the Greek CC.

[204] *Mason v Provident Clothing & Supply Co. Ltd.* [1913] A.C. 724. The claimant had taken on the obligation not to compete with his employer within 25 miles of London during a period of three years after terminating the employment relationship. The Chamber of Lords considered that it had been framed in deliberately wide terms, whereby the clause would have to be separated from the admissible part of the agreement.

[205] In Spanish law there is no rule of thumb concerning partial effectiveness, though there are some precepts for concrete cases which establish that the nullity of part of the contract will not affect the rest: Arts. 1155 (*cláusula penal* [penalty clause]); 1260 (*juramento* [oath-taking]); 1476 (*exoneración de evicción del vendedor de mala fe* [exemption from eviction of the seller in bad faith]), 1608 (*limitación de la remisión del censo* [limitation of census referral]), 1691 (*exclusión de un socio de las ganancias* [exclusion of one of the partners from the profits]) and 1826 (*fianza* in duriorem causam [*in duriorem causam* guarantee]). The STS of 27 February 1964 is symbolic, as has already been noted. The claimant (Bank of Spain) granted a loan of 3,000,000 pesetas guaranteed by the joint liability of another 10 people and the pledge of 6,000,000 shares in a trading company. After a number of financial problems, the debtor took out a mortgage on a property belonging to him for the purpose of offering the creditor greater security. The mortgage was taken out contrary to certain rules governing the banking business. As a result, the claimant alleged that the mortgage contract contained an illegal cause. By confirming the appeal court ruling, the High Court established the general doctrine on the effects of illegal contracts and identified several levels of effectiveness, notwithstanding the fact that the general consequence envisaged for illegal acts and contracts was radical nullity: (a) the invalidity of acts as provided for by law; (b) the effectiveness of acts contrary to the law, but whose legal effect is legally provided for; and (c) a flexible set of effects to be assessed by the court with regard to those acts whose sanction has not been provided for by law.

[206] Cfr. MACQUEEN, in La Tercera Parte de los Principios de Derecho Contractual Europeo, p. 560; LANDO et al., Principles of European Contract Law, Part III, p. 221.

[207] This requirement is observable in Belgian law (see the aforementioned judgement of the *Cour de cassation* of 23 January 2015).

evaluating the impact of partial ineffectiveness on the balance between the respective obligations of the parties[208].

This approach does not appear in the specific regulation of illegal and immoral contracts enshrined in the DCFR (Arts. II. – 7:301-7:305), but is more broadly established for any case of invalidity or ineffectiveness in Article II. – 1:108[209]. This last precept establishes that when only part of a contract or judicial act is invalid or ineffective, the remaining part will be valid if it can be reasonably maintained without the invalid or ineffective part. The extension of the rule of partial ineffectiveness in any case of invalidity is correct, since this rule is compatible with both nullity and avoidance, without the need to determine the causes giving rise to the invalidity.

6. Restitution

6.1. The flexible regime of restitution envisaged in the PECL

Paragraph 1, Article 15:104 PECL enshrines the general principle of *restitutio in integrum*. When a contract is rendered ineffective for contravening the law or some or other fundamental principle, both parties may claim the restitution of whatever has been supplied under it. Yet the formulation of this principle does not give rise to a rule of an absolute nature. Paragraph 2 makes it more flexible by requesting the court to bear in mind the factors indicated in Article 15:102(3) PECL[210] when assessing the need for restitution. Article 15:104 thus envisages a flexible regime of restitution of whatever has been received under an illegal and immoral contract[211]. Therefore, the court can grant or refuse restitution at its own discretion, after interpreting the meaning and purpose of the infringed rule or after an objective evaluation of the extralegal order in view of the infringed fundamental principle, and in both cases pursuant to the rest of the factors specified in the precept. Moreover, a rule concerning the good faith (clean hands rule) of whoever claims restitution is included, as repetition will not be granted to whoever knew, or ought to have known, about the reason for the ineffectiveness (No. 3, Art. 15:104 PECL). The system is completed with a subsidiary clause in the event that restitution in kind cannot be made, in which case it will substituted by a reasonable sum (No. 4, Art. 15:104).
In the DCFR, by contrast, instead of a detailed discussion on restitution, there is a general reference to the rules of unjustified enrichment in Article II. – 7:303. The comments to this article state that the «restitution, or unwinding the performances rendered under the illegal contract seems to be the most appropriate response to the invalidity.» Therefore, it is

[208] Cfr. MACQUEEN, in La Tercera Parte de los Principios de Derecho Contractual Europeo; LANDO et al., Principles of European Contract Law, Part III, p. 221.

[209] It should be observed that Chapter 2 of Book II is dedicated to precepts of general effectiveness for all contract law.

[210] A similar rule is envisaged in Art.3.3.2 of the UNIDROIT Principles: should a contract that infringes a mandatory rule be performed, the judge may grant restitution, provided that it is «reasonable» under the circumstances. The criteria that he or she should consider in order to assess this reasonableness are the same as those referred to in the previous precept (Art. 3.3.1 PICC): the purpose of the infringed rule; the seriousness of the infringement; whether one or both of the parties were, or ought to have been, aware of the infringement; if contract performance involves an infringement; and the reasonable expectations of both parties. See UNCETA LABORDA, *Principios de UNIDROIT e ilicitud del contrato internacional*, p. 626.

[211] LANDO et al., Principles of European Contract Law, Part III, p. 223.

acknowledged that restitution can be feasible but, as will be seen in greater detail in the following section, under the aegis of the rules of unjustified enrichment[212].

Different legal systems have historically displayed an internal tension between the rule of *restitutio in integrum* and that of *nemo auditur* in any of its forms (especially the *ex turpi causa melior est conditio possidentis* maxim)[213]. In short, abstracting the rules to the hilt, there are two models of approach to the issue. On the one hand, the continental European model (scholastic model) in which, first and foremost, a general rule of restitution of benefits is established with the aim of depriving of effects the act or contract declared ineffective, and, secondly, an exception (or exceptions) to this rule is formulated in order to prevent the repetition of whatever has been delivered when nullity stems from the infringement of the law, good morals or public policy. Even though the exception is formulated in different ways depending on the legal system, it always complies with the same principle, viz. *nemo aditur propiam turpitudinem allegans*. On the other, noteworthy is the Anglo-Saxon model based on the traditional *ex turpi causa melior est conditio possidentis* rule[214], while in more recent times the restitution of profits has been accepted in those cases in which the purpose of the parties has not depended on the nullity of the contract (Bowmaker rule). With time, to avoid injustice continental law has tended to limit, as far as possible, the application of the rule of non-repetition in cases of illegal or immoral contracts, whereas in Anglo-Saxon law there has been a rapid shift towards a broader application of the rule of restitution, despite the illegality[215].

All in all, courts have sensed the need to increase the flexibility of the rules of both models for the purpose of pursuing the justice of each specific case. This is the reason behind the introduction of this «principle of flexibility» in Article 15:104 PECL[216]. The best way to combat contractual illegality or immorality is a healthy discretionary approach, regardless of the apparent uncertainty that it may initially inspire. The results tend to be fair in their particular context[217].

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[212] VON BAR/CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law,* vol. 1, Art. II.-7:303, 2010, pp. 547 ss.

[213] See KÖTZ/PATTI, pp. 292 ss..; DANNEMANN, «Illegality as Defence Against Unjust Enrichment Claims», *Oxford U Comparative L Forum*, 4, 7, 2000, Available at http://ouclf.iuscomp.org/articles/dannemann.shtml; SWADLING, «The Role of Illegality in the English Law of Unjust Enrichment», *Oxford U Comparative L Forum*, 5, 7, 2000; ENONCHONG, *The International and Comparative Law Quarterly*, 44, 1, 1995, p. 211.

[214] For further details on the general rule in traditional common law, which is envisaged as a principle of policy, though not as a principle of justice and, therefore, allows for many exceptions, *see* BEATSON et al., in *Anson's Law of Contract*, 30th, pp. 436 ss. These authors recall that the fundamental principle according to which courts should act when dealing with an illegal contract was fully explained by Lord Mansfield in *Holman v Johnson* (1755) 1 Cowp, 341, 343: «The principle of the public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act [...]».

[215] SCHWENZER et al., *Global Sales and Contract Law*, p. 252, generally claim that «although there seems to be a clear divide between the civil law and common law on this point, exceptions found in both systems bring them closer together.»

[216] The idea of granting courts broad discretionary powers in order to determine whether or not restitution is warranted has also been one of the conclusions of the Law Commission of England and Wales in Consultation Paper No. 154). An in-depth assessment can be found in SPTL SOCIETY OF LEGAL SCHOLARS, *The Law Commission, commercial and common law. Team Illegality in Contract*, 2002, Available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Illegal_Transactions_Paper_Sept2002.pdf, p. 12 ss.

[217] «[T]he obvious advantage of a discretionary approach is that it enables courts to avoid results which are unjust to one party or unwise as a matter of legal policy. But its obvious drawback is the legal uncertainty which it creates. On the other hand, this uncertainty needs to be placed in its context», DANNEMANN, *Oxford U Comparative L Forum*, 4, 7, 2000, p. 8.

6.2. Restitution and unjustified enrichment in the DCFR

As has just been seen, the DCFR takes a different view on restitution than the PECL, as it is based on the dogmatic German approach that, as is generally known, frames this concept in the so-called «law of unjust enrichment» (*ungerechtfertigtes Bereicherungsrecht*). Indeed, Article II. – 7:303 establishes that «the question whether either party has a right to the return of whatever has been transferred or supplied under a contract, or part of a contract, which is void or has been avoided under this Section, or a monetary equivalent, is regulated by the rules on unjustified enrichment.» Well then, from the precepts of Articles VII. – 1:101[218], VII. – 5:101[219] and VIII. – 6:102 DCFR[220] it can be deduced that, on a general basis, whoever complies with the provisions of an illegal contract declared void has the right to claim the restitution of whatever has been transferred or supplied under it, in order to prevent the unjustified enrichment of the other contracting party. In a nutshell, the DCFR's regime of restitution is based on the general rule of *restitutio in integrum*, distancing itself from the approach that, grounded in Roman law, rejects restitutions and leaves the parties in the position in which they find themselves at the moment when the contract's invalidity is recognized (*ex turpi causa melior est conditio possidentis*)[221].

However, Article VII. – 6:103 anticipates an exception to the general obligation of restitution, designed exclusively for those cases in which the contract has been avoided for contravening the fundamental principles of the laws of the EU or a mandatory rule of law: «Where a contract or other juridical act under which an enrichment is obtained is void or avoided because of an infringement of a fundamental principle (II. – 7:301 – Contracts infringing fundamental principles) or mandatory rule of law, the enriched person is not liable to reverse the enrichment to the extent that the reversal would contravene the policy underlying the principle or rule.» It can be observed how the rule frees the party who has become unduly enriched from the obligation of restitution when this implies contravening the purpose or policy underlying the infringed principle or rule. In other words, restitution is not possible when it involves, in some way, an infringement of the purposes pursued by the infringed rule or principle.

Broadly speaking, the system works in a way similar to that established by the PECL, recognizing restitution on a general basis, except in certain special cases. Nonetheless, the influence of German law, described by some as a «hypnotic fascination» for the BGB[222], has

[218] «A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.»

[219] «Where the enrichment consists of a transferable asset, the enriched person reverses the enrichment by transferring the asset to the disadvantaged person.»

[220] «(1) Where goods are or have been transferred based on a contract or other juridical act which is invalid or avoided, the transferor may exercise the right of recovery under paragraph (1) of the preceding Article in order to recover physical control of the goods.»

[221] See VON BAR/CLIVE, Principles, Definitions and Model Rules of European Private Law, Art. II. – 7:303 DCFR Comment A.

[222] It should be borne in mind that the articles of the DCFR that envisage restitution refer exclusively to the effects of the termination of the contract deriving from an essential breach. It is remarkable, therefore, that the DCFR has wanted to distinguish the restorative effect deriving from the termination of the contract from that which arises from the nullity of an illegal contract. Well then, basically it seems that the authors of the DCFR have availed themselves of the distinction that is made in German law between the *Rücktritt* (§ 346) and *Ungerechtfertigtes Bereicherungsrecht* (§ 817). To wit, it distinguishes between restitution, associated with a

made the drafters of the DCFR inclined to associate restitution with the rule of unjustified enrichment[223]. And even though this concept is recognized in some way or another in all European legal systems, thus featuring in their common core, we believe that exporting concepts inherent or specific to other legal systems, however much this can be justified in the comparative methodological approximation to the quest for a better law approach, can lead to far from negligible problems of adaptation and understanding, especially as regards those legal systems (e.g., Spain) that have not expressly provided for the concept of unjustified enrichment and/or have not been able to forge through experience an advanced theory of restitution and unjustified enrichment (such as the British system). Therefore, we understand that the solution of the PECL may seem clearer and more easily acceptable to European legal operators.

7. Action for damages

7.1. Scope: negative or reliance interest

Both the PECL (Art. 15:105) and the DCFR (Art. II. – 7:304) establish rules on action for damages occurring as a consequence of the invalidity of a contract contrary to a rule of law or some or other fundamental principle, but there are some apparent differences that should be spelt out.

Article 15:105 PECL (*Damages*) provides for the following rules in this respect: (1) the injured party's right to take legal action and claim damages, provided that he or she did not know the reason for the illegality of the contract and it cannot be reasonably expected the he or she ought to have known it (Paragraph 1) and, correspondingly, the legitimacy to sue whoever knew, or ought to have known, the said motive (Paragraph 1); (2) limiting damages to negative or reliance interest: the plaintiff can only claim a compensation that places him or her in a position similar to that which he or she would have occupied if the contract had not been concluded (Paragraph 1); (3) denying the guilty party compensation (denial rule), insofar as compensation shall not be granted to whoever knew, or ought to have known, the reason for the illegality of the contract (Paragraph 3); and (4) interpretive rule: the court must take into account—although not exclusively, in our view—the factors provided for in Article 15:102(3).
With respect to Article II. – 7:304 DCFR (*Damages for loss*) dedicated to resolving the same issue, the rules are as follows: (1) legitimacy to sue: the requirements for entitlement and the conditions are the same (No. 1); (2) compensation, in principle, for any loss incurred as a consequence of the invalidity: «A party to a contract which is void or avoided, in whole or in part, […], is entitled to damages from the other party for any loss suffered as a result of the invalidity […]»; (3) limiting damages to negative or reliance interest, according to Paragraph 2 of the precept: «The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded or the infringing term had not been included»; and (4) refusing to award damages to the guilty party (denial rule), with the same scope as in the PECL.

breach of contract, and unjustified enrichment, restricted to void or voidable contracts. This option has been expressly criticized by SIRENA, for whom there is no reason for justifying the establishment of two different and autonomous regimes of contract restitution, SIRENA, «The DCFR – Restitution, unjust enrichment and related issues», *European Review of Contract Law*, 3, 2008, p. 450.

[223] SIRENA, European Review of Contract Law 3, 2008, pp. 447 ss.

In this context, two remarks can be made: (1) since Article II. – 7:304 does not include any interpretive rule, the court is under no obligation to take into account the factors listed in Article II. – 7:302, although undoubtedly it may choose to do so, which would be highly recommendable in those cases where there exists a specific mandatory or prohibitive rule; and (2) there is a clear contradiction, at least in their legal formulation, between the laxity of the rule of compensation for any loss (Art. II. – 7:304(1) DCFR) and that of limiting this to negative interest (Art. II. – 7:304(2) DCFR). The only way of resolving this issue is to take into consideration the precedent of Article 15:105 PECL and its comments, as well as resorting to common sense. If in doubt as to whether there should be compensation for any damages (for instance, loss of profit) or compensation limited to negative interest, it should be stressed that Article II. – 7:304 DCFR envisages compensation under the application of this last rule, expressly reasoned in Paragraph 2 of this precept with the intention of avoiding it being converted into a «hotchpotch», so the apparently broad scope with which damages are regulated in Paragraph 1 is simply down a linguistic excess of the drafters. This error should be corrected in the future or clarified in a re-edition of the DCFR's official comments.

Indeed, as expressed in the comments to Article 15:105 PECL, the aim of damages for the nullity of a contract contrary to the law or some or other fundamental principle is the same as that of restitution: to place the aggrieved party in the same position that he or she would have been in if the contract had not been concluded, viz., to protect his or her negative interest[224]. In this case, the comments do not shed any light on the origin of the award of compensation. In all likelihood, inspiration has been drawn from the traditional German *culpa in contrahendo* doctrine included in the reform of Germany's law of obligations in virtue of the *Schuldrechtsmodernisierungsgesetz* of 2001 in §§ 241 (2) and 311 (2) and (3) of the BGB itself. Furthermore, it is similar to Article 1338 of the Italian Civil Code which establishes that the party who knew, or ought to have known, about the existence of a reason for the contract's invalidity and chooses not to inform the other party about this is obliged to compensate for the loss suffered by the latter in view of the reality of the contract. In light of this information, positive interest is therefore excluded from this type of compensation. At any event, it should be clarified that the stance adopted by both the PECL and the DCFR, according to the interpretation defended here regarding the nature of compensation for the nullity of a contract declared illegal or contrary to some or other fundamental principle, is limited to this case. The nature of general compensation for breach of contract envisaged in Article 9:502 PECL and in Article III. – 3:702 DCFR corresponds to positive interest[225], which is present in most of the legal systems of the EU Member States and in the provisions of the Vienna Convention on the international sale of goods[226].

In the comments, mention is made of the fact that restitution is not necessary in all cases, insofar as it is possible that no transaction has taken place between the parties when nullity is declared, though one of the parties might have undertaken expenditure to enter into the

[224] MACQUEEN, in La Tercera Parte de los Principios del Derecho Contractual Europeo, p. 563; LANDO et al., Principles of European Contract Law, Part III, p. 226.

[225] LANDO/BEALE (eds.), Principles of European Contract Law, Part I, p. 646.

[226] Art. 45 (2) CISG; LANDO/BEALE (eds.), *Principles of European Contract Law,* Part I, p. 532. Among others, *see* the magnificent work by MOTA PINTO, *Interesse contratual negativo e interesse contratual positivo,* vol. I, Coimbra, 2008, p. 285; by the same token, with a profusion of notes on comparative law, PÉREZ VELÁZQUEZ, *La indemnización de daños y perjuicios por incumplimiento del contrato en los principios de derecho contractual europeo*, Agencia Estatal Boletín Oficial del Estado, 2016, p. 181

contract, and as a remedy to this circumstance reference is made to Article 15:105 PECL[227]. Thus, it would appear that the compensatory remedy would not be applied in the event that the provisions of the contract had been complied with.

To our mind, compensation limited to negative interest is fully compatible with restitution. Take, for example, an illegal supply contract that has begun to be performed by the parties and, for its effectiveness, one of them has had to make certain investments in his or her own company. Whatever provision has been made can be recuperated by means of compensation; and the costs incurred? Evidently, with the compensatory remedy the injured party can recoup them.

7.2. Requirements

The cases in which damages can be awarded on the basis of Articles 15:105 PECL and II. – 7:304 DCFR are as follows:

(1) Incidental expenditures incurred by the injured party. As already seen above, compensation to the injured party is limited to negative interest, namely, the expenditures or costs that he or she may have incurred in view of the reality of the contract that he or she deems valid. Unquestionably, the loss of profits is excluded. Likewise, as a result of this restriction to awardable damages, non-economic loss must also be excluded. Under this concept (negative interest) all those imaginable costs relating to the invalid contract are compensated. The monies that the innocent party has delivered to the other party in performance of the obligations corresponding to him or her can be recuperated by means of restitution.

In the comments of both the PECL and the DCFR the following example is given[228]: «Legislation requires the suppliers of certain chemicals to hold licences indicating compliance with safety and environmental standards. Contracts made by suppliers holding no licence are declared to be null. Company A, which has recently been deprived of its licence by government action, nevertheless concludes a contract for the supply of the chemicals to Company B, which is unaware of A's fall from grace and buys from it because its price is lower than that of the only other licensed supplier, C. B intends to use the chemicals for industrial purposes leading on to profitable contracts of its own, and spends money preparing its premises to handle the material safely. A's illegal conduct is discovered and the contract with B is declared null before either delivery or payment have taken place. B is unable to make the intended further contracts. While B cannot recover the expectation loss of profit on these further contracts, it may recover its incidental reliance expenditure on preparing its premises and any other costs associated with having contracted with A. These might include a figure for the loss of the opportunity to contract with C (as distinct from the extra cost of contracting with C or the profits which would have been earned had B concluded the contract with C rather than A).»

[227] Cfr. MACQUEEN, in La Tercera Parte de los Principios del Derecho Contractual Europeo; LANDO et al., Principles of European Contract Law.

[228] MACQUEEN, in La Tercera Parte de los Principios del Derecho Contractual Europeo, p. 563; LANDO et al., Principles of European Contract Law, Part III, p. 226; VON BAR/CLIVE (eds.), Principles, Definitions and Model Rules of European Private Law, vol. 1, Art. II.-7:304-Comments, p. 551.

(2) Innocence of the aggrieved party (clean hands rule). Whoever claims damages should not know, or have been in a position to know, the reason for nullity. He or she will not be able to plead ignorance of the rule of prohibition, although, depending on domestic law, indeed to have erred in fact and in law, provided that these be excusable.

(3) Connection between the expenditures or costs incurred and the contemplation of the void contract. A causal link should be established between these elements which should not be allowed to extend beyond this limit. In other words, if the illegally concluded contract had not existed, the plaintiff would not have incurred the costs that he or she is claiming (*condicio sine qua non*).

8. Conclusions

In modern contract law, a curious «cultural neologism» has been recently introduced by both the PECL and the DCFR with respect to *illegality*: *contracts contrary to the fundamental principles*. This revamping of the old concepts of *cause illicite*, *Sittenwidrigkeit* and illegality at common law might initially prompt some to censure it prematurely as an «artifice» or some sort of newfangled «legal alchemy». However, overcoming this preconception after a critical analysis of the issue, we believe that it is a key contribution to comparative law. This concept serves as an umbrella for three legal models which are really only at odds with one another as regards the terminology that they employ, but not so with respect to their social reality and legal context, i.e. they are systems that address similar problems, resolve very similar cases and offer mainly convergent legal solutions. Even though the Roman-French concept of *cause illicite*, the German notion of the general clause pertaining to *Sittenwidrigkeit* and the English common law conception of illegality at common law have different roots and nuances, a very strong convergence can be seen in their respective development; the differences are by no means insurmountable. The new concept would allow each legal system to function in its own sociocultural and legal framework (*boni mores/good morals/decency/gute Sitten*; *public policy/ordre public*) and give meaning to the expression «fundamental principles» on the basis of the «European constitutional texts» (mainly, the European Community Treaty, the European Convention on Human Rights and the European Union Charter on Fundamental Rights).

1. The cases of «contracts contrary to the fundamental principles» most frequently covered in the different legal systems make it possible to give an initially vague concept certain security and certainty (contracts that entail a violation of sexual morals and the principles of family life, contracts that restrict freedom of action in a personal and economic context, contracts that interfere with the due administration of justice, etc.). Their study reveals a high number of common solutions in the different legal systems, with very few exceptions to the rule.

2. Furthermore, the concept of contracts contrary to fundamental principles should include the category of contracts contrary to the prohibition of discrimination, at least for the reasons for which they are legally treated and on which there is a broader consensus: the prohibition of discrimination on the grounds of sex or ethnic or racial origin. The prohibition of discrimination (the «right not to be discriminated against») is a fundamental principle deriving from both EU primary law and its express formulation in the anti-

discrimination directives; therefore, any breach of this nature can be understood as a contract infringing fundamental principles.

3. In the category of contracts contrary to statutory provisions, there are three main models in the different European legal systems: *cause illicite* figuring in the Roman-French legal tradition, *Verstoß gegen ein gesetzliches Verbot* hailing from the Germanic legal tradition and the doctrine of statutory illegality deriving from the English legal tradition. An analysis of the cases and categories that are resolved by these three models leads to an especially relevant conclusion for comparative law: the penalties provided for in the different legal systems for infringing statutory provisions do not always fall into the category of radical or automatic nullity. Instead, there is now an increasingly marked tendency towards a *flexible regime* of legal consequences of «illegal contracts». Although the «diversity of possible effects» by means of a *flexible and discretionary system of ineffectiveness* is inherent to common law, it is compatible with the evolution of the other legal systems studied here. In the instruments of European soft law, this vision is fully catered for from the moment at which the corresponding regulations envisage a series of «relevant circumstances», without being exhaustive, which the judge can take into account when determining the degree of effectiveness/ineffectiveness of an illegal contract.

4. The common cases of contractual illegality (statutory provisions for the defense of competition, insurance activity management, against illegal employment, gaming and betting, *pactum de quota litis*, and surrogacy) are dealt with in a very similar way and only differ in the cases of «historical shifts». What we are referring to are those groups of cases in which contractual illegality has shifted from a moral prohibition with legal effect or an infringement of public policy towards an express legal prohibition, or vice versa. Versus certain infringements in which a contract with a *cause illicite* or, should this be the case, a *Sittenwidrigkeit*, is concluded, some legal systems prefer to dispel all future doubts by formulating an express prohibition (e.g. that of the *pactum de quota litis* in Germany and historically in Spain) or, after a fairly controversial development, by removing it from the category of illegal contracts (e.g. the permissibility of the *pactum de quota litis* in current Spanish law); while for certain violations of legal prohibitions some legal systems also regard them as contracts contrary to good morals or public policy, as if this second description reinforced the prohibition (this is the case, for example, with the legal treatment of surrogacy in the majority of European countries, although this should be contrasted with its partial permissibility in quite a few others).

5. In current European law, the effects of a contract being declared contrary to fundamental principles or to the law have been rearranged rationally into four different concepts: (a) ineffectiveness of a contract: nullity, partial ineffectiveness and a flexible regime in the case of contracts contrary to a mandatory rule of law; (b) duty of restitution of whatever has been supplied under the contract; (c) effect of the transfer of property; and (d) damages for loss. The development of a flexible regime of ineffectiveness of contracts contrary to statutory rules is an important development in modern European law which is compatible with some legal systems, above all English common law.

6. The solution envisaged in modern European law regarding the effects of the declaration of ineffectiveness of a contract contrary to fundamental principles or prohibitive rules on the right of ownership (the effects of nullity or avoidance on rights of ownership is retroactive,

therefore the assets will continue to belong to the same party as before their conveyance by virtue of the void or avoided contract) is not the same in all legal systems. The solution may seem totally logical for jurists specializing in continental Roman law, but not so for those influenced by Germanic or common law.

7. Modern European law envisages a flexible regime of restitution (the judge can grant or refuse the *restitutio in integrum* in accordance with a series of assumptions and, in specific cases, apply other criteria such as the *nemo auditor* or clean hands rule. Although there has been a historical divergence between the different legal systems with the application of diverse rules of restitution, their evolution has shown that the real solutions tend to be functionally equivalent.

8. This European soft law also envisages the remedy of compensation in the event that a contract is declared unenforceable. After overcoming some of the initial doubts about the nature of this compensation, we have reached the conclusion that this should be limited to negative interest, which is a solution more in tune with practical reality and the rules expressly provided for in the legal systems that envisage this remedy for the nullity of a contract.

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